

DRAFT

UNITARY ADMINISTRATION AND MANAGEMENT ORDINANCE

Updated Public Review Draft—Not Agreed to by Any Party

March 19, 2011

This is a working draft of revisions to the Draft Unitary Administration and Management Ordinance (“Draft Ordinance”). This document has not been finally approved by any Party. Nothing in the potential settlement is agreed to until everything is agreed to.

Several provisions in this draft are under development or review by the Parties. Several provisions are in [brackets]; this indicates that the Parties are still reviewing these provisions. This draft also contains notes regarding outstanding issues or drafting in *[italics and brackets]*. The Parties will update the Public Review Draft as other sections become ready.

Several provisions in this draft reference forms to be filed or certificates to be issued in connection with various actions. With the exception of those forms that have already been made public in connection with the public release of particular sections of this draft Ordinance, the content of these forms and certificates remain under development by the negotiating parties.

Comments on this draft should be sent to the Confederated Salish and Kootenai Tribes (CSKT) or the Montana Reserved Water Rights Compact Commission for review by the Parties. Comments to CSKT should be sent to Rhonda Swaney at rhondas@cstk.org, comments to the Compact Commission should be sent to Bill Schultz at bischultz@mt.gov.

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CHAPTER I WATER RESOURCES CONSERVATION, DEVELOPMENT AND ADMINISTRATION

PART 1 - GENERAL PROVISIONS

1-1-101. Authority.

1. This Ordinance is adopted in exercise of the sovereign powers of the Confederated Salish and Kootenai Tribes (Tribes), as reserved and recognized in the Treaty of Hellgate, 12 Stat. 975, by which the Confederated Salish and Kootenai Tribes reserved the present Flathead Reservation for their exclusive use and benefit, and by the authority of the Tribal Council of the Tribes as provided in Article VI, Section 1(a), (n), (t), and (u) of the Tribal Constitution, approved October 26, 1935 by the Secretary of the Interior pursuant to Section 16 of the Indian Reorganization Act of 1934 (25 U.S.C. § 476). [*Federal Team reviewing*]
2. This Ordinance parallels legislation adopted by the State of Montana pursuant to legislative approval of the Confederated Salish and Kootenai Tribes-Montana Compact and the Montana Water Use Act of 1973 to effectuate Unitary Administration and Management on the Flathead Indian Reservation. Such parallel legislation will be codified in the Montana Code Annotated in Title 85.
3. This Ordinance and the parallel Montana legislation are contingently effective; neither operates with the force and effect of law without the other. No modification by the Tribes or

the State of Montana of these respective laws shall be effective within the exterior boundaries of the Reservation unless and until the other makes an analogous modification.

[**Note to reviewers:** *legislation would go to the State legislature for ratification along with the Compact. It is expected to mirror this draft Ordinance in all materials respects, but it has not yet been drafted*]

1-1-102. Findings and Policy. The Tribal Council finds and declares as follows:

1. The waters of the Flathead Reservation are a hydrological unitary resource in that
 - a. all waters of the Reservation drain into the Flathead River, a part of the Columbia River system, or into Flathead Lake, a naturally occurring lake which is fed by the Flathead River north of the Reservation and which empties into the Flathead River within the Reservation, and
 - b. most of the water appropriated and utilized by the people on the Reservation is taken from streams and Groundwater arising on or under lands owned by the Tribes and tributary to the Flathead Lake or the Flathead River; the balance of the surface water consumed on the Reservation is appropriated and diverted from off-Reservation sources by the United States, and
 - c. there is a clear hydrological interrelationship between the surface and Groundwater of the Reservation, and
 - d. each use of water of the Reservation may affect water use by all Reservation residents;

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2. Prudent and knowledgeable conservation, management, and protection of the uses of water resources of the Reservation are essential to the health and welfare of all Reservation residents;
3. The waters of the Reservation are one of the foremost assets of the Reservation, and Reservation resident well-being and development depends, in large measure, on wise and stable regulation of the appropriation, use, and conservation of this resource; and
4. The public policy of the Confederated Salish and Kootenai Tribes is
 - a. to provide for the conservation, development, beneficial use, and quality of the water resources of the Reservation to promote the health, welfare, and economic and social prosperity of Reservation residents,
 - b. to recognize and confirm valid existing uses of waters of the Reservation for any beneficial purpose consistent with the policies and provisions of the Compact and this Ordinance,
 - c. to manage and protect supplies of waters of the Reservation that are adequate to preserve the ecosystem of the Reservation, to conserve and enhance Reservation wildlife and fisheries, to maintain and improve opportunities for water-based recreation, and to secure to Reservation residents the quiet enjoyment of the use of waters of the Reservation for beneficial uses,
 - d. to provide methods and procedures for the appropriation of the waters, for maintenance and enhancement of water quality, and for the establishment and maintenance of a system of central records of permitted water uses of the Reservation, and

- e. to secure the greatest benefits from the use of Reservation waters by sound coordination of conservation and development with the development and use of other natural resources of the Reservation.

1-1-103. Notice of Enactment. To insure that all Persons affected by this Ordinance are given notice of its enactment, its effective date, and its purpose, the Water Management Board, no later than sixty (60) days prior to the date set in Section 1-1-116, establishing the effective date of this Ordinance shall cause the following notice to be posted on its website, and also published weekly for four weeks in (1) a daily newspaper of general circulation on the Flathead Reservation, (2) one or more weekly newspapers of general circulation on the Flathead Reservation, and (3) the Tribal newspaper:

[INSERT NOTICE HERE]

1-1-104. Definitions. Unless otherwise defined herein, capitalized terms used in this Ordinance shall have the meaning set forth in the Compact.

1. “Abandonment” means the relinquishment of a water right that occurs when an appropriator ceases to use all or a part of an appropriation right or ceases to use the appropriation right according to its terms and conditions for a period of ten (10) consecutive years when there was water available for use. Such discontinuation of use constitutes a rebuttable presumption that the appropriator has abandoned the right for the part not used; subject however, to federal law on abandonment of the Tribal Water Right.

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2. “Aboriginal Water Right” means a Tribal reserved water right for cultural and religious uses and for instream flows and ecological functions beneficial to aquatic and terrestrial plants and animals that support traditional lifestyle activities, such as fishing, hunting and gathering, as reserved by the Tribes in the Treaty of Hellgate, with a priority date of time immemorial.
[This definition under review.]
3. “Allottee” means an owner of an interest in a tract of land held in trust by the United States of America which was allotted pursuant to the Act of April 23, 1904, 33 Stat. 302, as amended, or the Act of February 25, 1920, 41 Stat. 452, as amended.
4. “Appropriate” means to divert, impound, maintain an instream or impoundment use, or withdraw a quantity of water for a beneficial use on the Flathead Indian Reservation under color of law.
5. “Appropriation” means the diversion, impoundment, maintenance of an instream, wetland, or impoundment use, or the withdrawal of a quantity of water for a Beneficial Use on the Flathead Indian Reservation under color of law.
6. “Appropriation Right” means a right to appropriate water issued by the Water Management Board pursuant to the terms of the Compact and this Ordinance.
7. “Aquifer Injection” means the subsurface discharge of fluids into the ground by means of an Injection Well.
8. “Appropriator” means a Person who Appropriates water.

9. “Approval to Develop a Domestic Allowance” means preliminary approval or authorization from the Office of the Engineer to Develop a Domestic Allowance. This approval must be obtained before drilling a Well or developing a spring.
10. “Beneficial Use” means a consumptive or non-consumptive use of water for the benefit of the appropriator, other Persons, the Tribes, one or more Tribal members, or the general public, including but not limited to agricultural, stock water, domestic, fish and wildlife, cultural and religious practices, industrial, Instream Flow, irrigation, mining, Mitigation Water, municipal, power, recreational uses, and Wetlands.
11. “Business” means a building or site where commercial work is carried on, including but not limited to a factory, store, or office.
12. “Change in Use” means an authorized change in the point of diversion, the place of use, the period of use, the purpose of use, or the place of storage of a water right created or recognized under this Ordinance. A changed water right retains the original priority date of that right.
13. “Compact” means that water rights settlement entered into by the Confederated Salish and Kootenai Tribes, the State of Montana, and the United States.
14. “Consumptive Use” means the amount of water used for a beneficial purpose, such as water transpired by growing vegetation, evaporated from soils or water surfaces, or incorporated into products, that does not return to the Groundwater or surface water source.
15. "Current Use" means a use of the Tribal Water Right in existence as of the date the ratification of the Compact by the Montana Legislature takes effect under State law.

16. “DNRC” means the Montana Department of Natural Resources and Conservation, or any successor agency.
17. “Designee” means a Person selected by the Engineer to exercise, in regard to a particular application or objection, those powers assigned to the Engineer under Chapter II of this Ordinance.
18. “Developed Spring” means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.
19. “Development” means contiguous or closely grouped parcels of land under the same or affiliated ownership, including, but not limited to, housing subdivisions or any combination of business and residential units.
20. “Domestic Allowance” means an entitlement to use water issued to households and small businesses pursuant to the provisions of Section 2-2-117 of this Ordinance; Domestic Allowances include Individual Domestic Allowances, Shared Domestic Allowances, and Development Domestic Allowances.
21. “Domestic Use” means those water uses common to a household, including: washing; drinking; bathing; waste disposal; cooling and heating; domestic animals; and garden and landscape irrigation. Domestic Use does not include the filling of ponds, pits, pit-dams or reservoirs.

22. “Emergency” means a situation that demands unusual or immediate action to prevent imminent injury to life, property, or the environment.
23. “Enclosed Storage” means a storage container fully enclosed to include a cistern or tank.
24. “Existing Use” means a beneficial use of water under color of Tribal, State or Federal law in existence as of the date the ratification of the Compact by the Montana legislature takes effect under State law, including uses in existence on that date that are eligible for the registration processes set forth in Sections 2-1-101 and 2-1-107 of this Ordinance, provided that any portion of a Water Right Arising Under State Law within the Reservation that is, at any point after the date the ratification of the Compact by the Montana legislature takes effect under State law, voluntarily relinquished or is legally determined to be abandoned, relinquished, or have otherwise ceased to exist, shall be stricken from the relevant basin decree as a Water Right Arising Under State Law and be entitled to no further protection as such a right or as an Existing Use pursuant to the Compact.
25. “Flathead Indian Irrigation Project” or “Project” means the irrigation project developed by the United States to irrigate lands within the Reservation pursuant to the Act of April 23, 1904, Public Law 58-159, 33 Stat. 302 (1904), and the Act of May 29, 1908, Public Law 60-156, 35 Stat. 441 (1908), and includes, but is not limited to, all lands, reservoirs, whether situated on or off the Reservation, easements, rights-of-way, canals, ditches, laterals, or any other Project facilities, head gates, pipelines, pumps, buildings, heavy equipment, vehicles, supplies, records or copies of records and all other physical, tangible objects, whether of real or personal property, used in the management and operation of the Project.

26. “Flathead Indian Reservation” or “Reservation” means all land within the exterior boundaries of the Indian Reservation established under the July 16, 1855 Treaty of Hellgate (12 Stat. 975), notwithstanding the issuance of any patent, and including rights-of-way running through the Reservation.
27. “Flathead System Compact Water” means that portion of the Tribal Water Right consisting of 229,383 acre feet per year that the Tribes may withdraw from the Flathead River or Flathead Lake, which includes up to 90,000 acre feet per year stored in Hungry Horse Reservoir, with a maximum total volume consumed of 128,158 acre feet per year.
28. “Groundwater” means any water that is below the surface of the earth.
29. “Groundwater Management Area” means an area designated and managed under Section 1-1-109.
30. “Home” means a house, apartment, or other shelter that is a permanent or temporary residence of a Person, family, or household.
31. “Illegal Use of Water” or “Illegally” means to use water with no Water Right Arising Under State Law, authorization from the Tribes to use a portion of the Tribal Water Right, or Appropriation Right issued by the Board,
32. “Injection Well” means a Well utilized for injecting fluids or gases into geologic materials. Open pits, ponds, or excavations are not considered injection wells.
33. “Instream Flow” means *[this definition under development]*.
34. “Livestock” – means cattle, bison, sheep, swine, horses, mules, goats, or other animals specifically raised and used for food or fiber or as a beast of burden.

35. “Mitigation” means the reallocation of surface water or Groundwater through a Change in Existing Use or other means to offset Net Depletions of surface water or Groundwater by new Appropriations causing adverse effects to Appropriators.
36. “Mitigation Plan” means a plan as developed by an applicant to provide Mitigation.
37. “NRD” means the Confederated Salish and Kootenai Tribes’ Natural Resources Department.
38. “Natural Wetland” means a wetland area that is maintained with a natural surface water source, natural groundwater source or a combination of natural surface water and natural groundwater without any artificial means of diversion, impoundment, withdrawal, excavation, or other artificial means of control.
39. “Net Depletion” means, the calculated volume, rate, timing, and location of reductions to a water source resulting from a proposed appropriation that are not offset by the corresponding accretions to that source caused by the new appropriation.
40. “Non-consumptive Use” means any beneficial use of water that does not meet the definition of consumptive use, including water used for Indian cultural and religious practices and beliefs.
41. “Person” means an individual, corporation, partnership, firm, entity, association, government, governmental agency, or a political subdivision of a government.
42. “Pits, Pit-dams, Constructed Ponds, or Reservoirs” refer to bodies of water that are created by man-made means and which store water for beneficial use.
43. “Possessory interest” means the right to exert some interest or form of control over specific land. It is the legal right to possess or use property by virtue of an interest created in the

property, though it need not be accompanied by fee title, such as the right of a tenant, easement holder, or lessee.

44. “Public Water Supply System” means a system for the provision of water for human consumption that has at least 15 service connections or that regularly serves at least 25 Persons daily for any 60 or more days in a calendar year.
45. “Publish” or “Publication” means, unless otherwise designated, the printing of an announcement of document availability, or the text of the document itself, in a newspaper of general circulation on the Reservation and in the Tribal newspaper and posting on the Water Management Board’s website. *[Revise regarding notice provisions, electronic posting, etc.]*
46. “Redundant Well” means a Well to provide a backup source of water for a Public Water Supply System.
47. “Registration” means the process of recording those Existing Uses that are identified in Sections 2-1-101 and 2-1-107 of this Ordinance.
48. “Restored Natural Wetland” means a wetland area that, upon restoration, shall be maintained with a natural surface water source, natural groundwater source, or a combination of natural surface water and natural groundwater without any artificial means of diversion, impoundment, withdrawal, excavation, or other artificial means of control.
49. “Secretary” means the Secretary of the United States Department of the Interior or the Secretary’s assigned representative.
50. “Saved Water” means *[This definition under development]*
51. “Shall” means a mandatory and not a discretionary act.

52. “Shared Well” means a single Well that is physically manifold to multiple homes and/or businesses and is cooperatively used pursuant a Shared Well Agreement.
53. “Shared Well Agreement” means a legally binding document that stipulates the manner in which a Shared Well is cooperatively used between or among all Homes or Businesses connected to the well; it is signed by all possessory interest representatives for all individual homes and businesses that are connected to a Shared Well.
54. “Spring” means a perennial hydrologic occurrence of water involving the natural flow of water originating from beneath the land surface and arising to the surface of the ground.
55. “Staff” means the staff of the Office of the Water Engineer.
56. “Stock Tank” means a 30 to 1500 gallon tank used to provide drinking water for Livestock that is equipped with a water level regulator that shuts off supply to keep the Stock Tank from overflowing.
57. “Substitute Well” means a Well that replaces an existing Well which is to be abandoned.
58. "Temporary Emergency Appropriation" means the temporary beneficial use of water necessary to protect lives , property, or the environment, by reason of fire, storm, earthquake or other disaster, or unforeseen combination of circumstances which call for immediate action. An appropriation made necessary due to drought conditions is not a temporary emergency appropriation.
59. “Temporary Groundwater Management Area” means an area established pursuant to Section 1-1-109(10).

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60. “Tribal Member” means a Person who is lawfully enrolled by and whose name appears on the official enrollment list of the Confederated Salish and Kootenai Tribes.
61. “Tribal Water Right” means the water rights of the Confederated Salish and Kootenai Tribes, including any Tribal member or Allottee, described in Article III of the Compact.
62. “Tribes” means the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and all officers, agencies, and departments thereof.
63. “Waste or Wasting” means the unreasonable loss of water resulting from the design, construction, operation or maintenance of a water diversion, storage or distribution facility, Well, Developed Spring, or the application of water to anything but a beneficial use.
64. “Water Engineer” or “Engineer” means the Person satisfying the criteria in Section 1-2-109 employed by the Water Management Board to exercise the powers and duties of the Water Engineer as set forth in the Compact and this Ordinance.
65. “Water Management Board” or “Board” means the board created by Article IV.C of the Compact and vested with the responsibilities set forth in the Compact and in Tribal and State law for the administration of water within the Reservation.
66. “Water Rights Arising Under State Law” means those water rights Arising Under State Law existing as of the date the ratification of the Compact by the Montana legislature takes effect under State law and not subsequently relinquished or abandoned, as those rights are: finally adjudicated by a court of competent jurisdiction; permitted by the DNRC prior to the date the ratification of the Compact by the Montana legislature takes effect under State law; exempted

from filing in the State adjudication pursuant to 85-2-222, MCA; or excepted from the permitting process pursuant to 85-2-306, MCA.

67. “Water Year” means the annual period of time commencing on October 1st and ending on September 30th of each year.
68. “Well” means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.
69. “Well Log Report” means DNRC Form No. 603 (see ARM 36.12.102).
70. “Well Shaft Casing” means an impervious durable pipe placed in a well or developed spring to prevent the walls from caving, to seal off surface drainage, or undesirable water, gas, or other fluids to prevent their entering the well, and to prevent the waste of groundwater.
71. “Wetland” means an area that is inundated or saturated by surface water or Groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.
72. “Wetland Quantified Appropriation Right” means an Appropriation Right issued for a Wetlands purpose that utilizes any man-made diversions, impoundment, withdrawals, excavations, or other artificial means for the purposes of appropriation for either all or a portion of a Wetland.
73. “Wetland Protective Appropriation Right” means an Appropriation Right issued for either a Natural Wetland or Restored Natural Wetland.

74. “Works” means all property, real or personal, necessary or convenient to the appropriation, conservation, storage, diversion, distribution, development, screening and utilization of water.

1-1-105. Measurement of Water. Upon the effective date of this Ordinance, legal standards of measurement of water within the Flathead Reservation shall be as follows:

1. Flow rates shall be measured in cubic feet per second (Cfs), unless otherwise provide herein. Where documentary evidence of an existing use is expressed in gallons per minute, 448.8 gallons per minute shall be considered equivalent to a flow of one cubic foot per second. Where documentary evidence of an existing use is expressed in statutory or miner’s inches, 40 statutory or miner’s inches shall be considered equivalent to a flow of one cubic foot per second.
2. Volumes of water shall be measured in acre-feet, unless otherwise provided herein. One acre-foot shall be considered equivalent to a volume of 43,560 cubic feet. One cubic foot shall be considered equivalent to a volume of 7.48 gallons.

1-1-106. Measurement of Time. Whenever in this Ordinance an action is required to be performed within a certain number of days, the time for completion of the act shall be measured in calendar days unless the last day falls on a Friday, Saturday, Sunday, or Tribal, State or Federal legal holiday, in which case the time for performance is extended to the next subsequent business weekday.

1-1-107. Appropriation Rights Allowed.

1. The following appropriation rights or changes in appropriation rights may be authorized by the Board pursuant to the Compact and this Ordinance:
 - a. Groundwater appropriations for Redundant or Substitute Wells as set forth in Section 2-2-115 of this Ordinance;
 - b. Stock Water Allowances as set forth in Section 2-2-116 of this Ordinance;
 - c. Domestic Allowances as set forth in Section 2-2-117 of this Ordinance;
 - d. Uses of Flathead System Compact Water as set forth in Section 2-2-118 of this Ordinance;
 - e. authorizations for non-consumptive geothermal heating or cooling exchange Wells as set forth in Section 2-2-119 of this Ordinance;
 - f. Temporary Emergency Appropriations as set forth in Section 2-2-120 of this Ordinance;
 - g. Permits or Changes in Use for Wetlands as set forth in Sections 2-2-123 and 2-2-124 of this Ordinance.
 - h. Permits for non-consumptive uses, including, but not limited to, hydropower generation and not including flow-through ponds;
 - i. Appropriations for which adverse effects to Existing Uses are offset by Mitigation.
 - j. Changes in Use except for those uses authorized under subsections (1)(a), (1)(b), (1)(c), (1)(e), (1)(f), (1)(l), or (1)(m) of this Section or those Existing Uses exempt from the permitting requirements of MCA 85-2-306 or from the claim filing requirements of MCA

85-2-221 as set forth in MCA 85-2-222; provided that a use authorized under subsection (1)(h) may not be changed from a non-consumptive use to a consumptive use. Change in Use as a result of Saved Water... [*The definition of Saved Water and process for identifying Saved Water and approving Changes in Existing Use as a result of Saved Water is under development*]

- k. Permits to appropriate surface water to conduct response actions related to natural resource restoration required for:
 - i. remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.;
 - ii. aquatic resource activities carried out in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251 through 1387; or
 - iii. remedial actions taken pursuant to the Remedial Action Upon Release of Hazardous Substance Act, Title 75, chapter 10, part 7, MCA.No permit issued pursuant to this subsection may be used for dilution.
- l. Permits for uses of surface water for or by a municipality or regional distribution system.
- m. Appropriation Rights for new uses of the Tribal Water Right by the Tribes, Tribal Members, or Allottees, provided that any such new uses be sourced from:
 - i. Flathead System Compact Water; or
 - ii. another source, provided that any adverse effects to Existing Users caused by the Net Depletion of the new Appropriation Right must be offset by Mitigation pursuant to Section 1-1-112 of this Ordinance.

2. Except as set forth in subsection (1) of this Section and in Section 2-2-118 of this Ordinance, the Board may not grant a permit or other authorization to appropriate surface water or Groundwater within the exterior boundaries of the Flathead Indian Reservation.

1-1-108. Reservation Water Rights Database. The Board shall cause all water rights information generated or authorized by the Board to be entered into the DNRC water rights database in a format agreed to by the Board and the DNRC.

1-1-109. Groundwater Management Areas.

The Board may designate, modify, or repeal either permanent or temporary Groundwater Management Areas as provided in this part.

1. Each designation of a Groundwater Management Area shall identify the need for the special management, the boundaries of the area, the water resources targeted for special management, and the specific restrictions that will apply in the Groundwater Management Area.
2. The designation, modification, or repeal of a Groundwater Management Area may be initiated by submission of a correct and complete petition by:
 - a. the Tribes, the State, or the United States;
 - b. a local public health agency;
 - c. a municipality, county, or conservation district; or

- d. at least one-third of the water rights holders in a proposed Groundwater Management Area.
3. A correct and complete petition shall:
- a. be in a form prescribed by the Board;
 - b. contain facts and analysis prepared by a hydrologist, hydrogeologist, qualified scientist, or a qualified licensed professional engineer demonstrating the existence of one or more of the criteria set forth in subsection (8) are met; and
 - c. describe proposed measures, if any, needed to mitigate effects of the criteria identified in subsection (8); and that are alleged in the petition or describe rationale as to why a Groundwater Management Area should be repealed or modified.
4. Upon receipt of a completed petition complying with subsection (3) of this Section, the office of the Water Engineer shall date stamp the petition.
5. Office of the Engineer review:
- a. within 180 days of the date of receipt of the petition pursuant to subsection (4) of this Section, the Office of the Engineer shall:
 - i. determine in writing that the petition is correct and complete; or
 - ii. notify the petitioner of any defects in a petition, with an explanation in writing of the defect(s).
 - b. any petition that is returned pursuant to subsection (5)(a)(ii) of this Section and not corrected within 90 days from the date of return shall be deemed terminated.

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- c. if the Office of the Engineer does not notify the petitioner pursuant to subsection (6)(a) of this Section, the petition shall be treated as correct and complete.
6. Board review:
- a. within 60 days after a petition is determined to be correct and complete, the Board shall:
 - i. deny the petition in writing in whole or part, stating the reasons for denial;
 - ii. inform the petitioner in writing that the Board will study the information presented in the petition for a period not to exceed 90 days before denying or proceeding with the petition; or
 - iii. publish notice of the Board's consideration of action concerning a permanent or temporary Groundwater Management Area pursuant to subsection (8) of this Section.
 - b. failure of the Board to act under subsection (7)(a) of this Section shall be deemed a denial of the petition.
7. If the Board determines that a correct and complete petition contains sufficient information to warrant the Board granting the petition, the Board shall proceed to hear the petition. The Board shall provide public notice of the rulemaking hearing by:
- a. publishing a notice at least once each week for 3 successive weeks, with the first notice not less than 30 days before the date of the hearing in a newspaper of general circulation on the Reservation;
 - b. serving by mail a copy of the notice, not less than 30 days before the hearing, upon each Person or public agency known from an examination of the records of the Board to be a water right holder within the proposed or existing Groundwater Management Area;

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- c. serving by mail a copy of the notice upon any other Person or Tribal or State or federal agency that the Board considers may be interested in or affected by the proposed designation, modification, or repeal of a Groundwater Management Area.
 - d. the notice under subsections (7)(a) through (7)(c) must include a summary of the basis for the proposed action. Publication and mailing of the notice as prescribed in this Section, when completed, is considered to be sufficient notice of the hearing to all interested parties.
 - e. the Board shall make available to the public by website a complete copy of the petition or request to designate, modify, or repeal either permanent or temporary Groundwater Management Areas.
8. The Board may designate a permanent Groundwater Management Area if it finds by a preponderance of the evidence that any of the following criteria have been met:
- a. current or projected reductions of recharge to the aquifer or aquifers within the boundaries of the proposed permanent Groundwater Management Area will cause groundwater levels to decline to the extent that water rights holders cannot reasonably exercise their water rights;
 - b. current or projected groundwater withdrawals from the aquifer or aquifers in the boundaries of the permanent Groundwater Management Area have reduced or will reduce groundwater levels or surface water availability necessary for water rights holders to reasonably exercise their water rights;

- c. current or projected groundwater withdrawals from the aquifer or aquifers in the proposed permanent Groundwater Management Area have impaired or will impair groundwater quality necessary for water right holders to reasonably exercise their water rights based on relevant water quality standards;
 - d. groundwater within the proposed permanent Groundwater Management Area is not suitable for any beneficial use; or
 - e. public health, safety, or welfare is or will become at risk.
9. Monitoring and studies:
- a. if the Board finds that sufficient facts, including monitoring information, are not available to designate a permanent Groundwater Management Area, the Board may designate temporary Groundwater Management Area to allow studies to obtain the facts needed to:
 - i. correct deficiencies that the Board identifies in a petition for a permanent Groundwater Management Area;
 - ii. determine the extent that the criteria identified in subsection (8) are met or not met;
 - iii. determine appropriate control measures to implement to designate a permanent Groundwater Management Area.
 - b. the Board shall set the length of time that the temporary Groundwater Management Area shall be in effect. The term of a temporary Groundwater Management Area may be extended by the Board, but may not exceed a total of 6 years.
 - c. the Board shall determine the responsibility for funding the costs associated with subsection (9)(a). Any person on whom a funding responsibility is placed by the Board

pursuant to this subsection may appeal that determination to a court of competent jurisdiction, which shall review the determination for an abuse of discretion.

- d. prior to designating a temporary Groundwater Management Area, the Board shall provide notice and the opportunity for public hearing pursuant to the notice provisions of subsection (7) of this Section.
 - e. a temporary Groundwater Management Area designation is for the purpose of monitoring and study and cannot include the control provisions set forth in subsection (10) of this Section, other than measurement, water quality testing, and reporting.
 - f. prior to expiration of a temporary Groundwater Management Area, the Board may amend or repeal the establishment of the temporary Groundwater Management Area, or may designate a permanent Groundwater Management Area under this Section.
10. A permanent Groundwater Management Area may include, but is not limited to, one or more of the following provisions:
- a. closing the permanent Groundwater Management Area to further appropriation of surface water and/or groundwater;
 - b. restricting the development of future surface water and/or groundwater appropriations within the permanent Groundwater Management Area;
 - c. prohibiting or restricting the issuance of Stock Water Allowances pursuant to Section 2-2-116 of this Ordinance;
 - d. prohibiting or restricting the issuance of Domestic Allowances pursuant to Section 2-2-117 of this Ordinance;

- e. requiring measurement and reporting of future surface water or Groundwater appropriations within the permanent Groundwater Management Area;
 - f. requiring water conservation measures within the permanent Groundwater Management Area;
 - g. requiring mitigation of groundwater withdrawals within the permanent Groundwater Management Area;
 - h. reporting data to the Board within the permanent Groundwater Management Area; and
 - i. other provisions that the Board determines are appropriate and adopts.
11. The Board, upon petition, may modify or repeal a Groundwater Management Area. Any petition seeking the modification or repeal of a permanent Groundwater Management Area must demonstrate by a preponderance of the evidence that current or projected recharge to the aquifer or aquifers or changes to current or projected groundwater withdrawals from the aquifer or aquifers in the boundaries of an existing Groundwater Management Area justify modification or repeal of that Groundwater Management Area.
12. Appeal from any final decision of the Board concerning the designation, modification or repeal of any permanent Groundwater Management Area pursuant to this Section shall be as set forth in Section 2-2-112 of this Ordinance.
13. If the Board determines that it is appropriate for a Groundwater Management Area identified pursuant to this section to extend to an area adjacent to but outside the boundaries of the Reservation, the Board, through the Office of the Engineer, may petition the DNRC, pursuant to § 85-2-506(2)(c)(i), MCA, to designate a Controlled Groundwater Area in that adjacent

area. Designation or modification by the DNRC of a Controlled Groundwater Area in any such adjacent area shall be governed by the procedures set forth in § 85-2-506, MCA.

1-1-110. Standards for Applications for New Appropriations and Changes in Use.

In addition to whatever information is required by specific provisions of the Ordinance, all applications for new Appropriations and Changes in Use must include:

1. An identification of the proposed beneficial use.
2. An identification of the source of water supply.
3. A project description, including an identification of any water right(s) to be changed to a new use, if applicable.
4. A legal description of the point of diversion and the place of use.
5. The monthly volume(s) and flow rate(s) of the water supply to be diverted, withdrawn, or impounded, and the monthly volume(s) to be consumed; however the Office of the Engineer may require a more frequent quantification time step.
6. The monthly historic diverted, withdrawn, or impounded volume(s) and flow rate(s) and the historically consumed volume(s) of the water right(s) to be changed to a new use, if applicable; however, the Office of the Engineer may require a more frequent quantification time step.
7. The calculations, references and methodologies used to determine the volume(s) and flow rate(s) in subsections (5) and (6) above.

8. [Identification of physical water availability and existing legal demands on the source of supply of water. *Parties are considering whether more specific criteria are available*]
9. Evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate.
10. Evidence of Possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, diverted, conveyed, impounded, stored, transported, withdrawn, used, and distributed.
11. Information showing that the water quantity or quality of an Appropriator will not be adversely affected, if applicable.
12. Map(s)
 - a. United States Geological Survey (USGS) quadrangle map or United States Department of Agriculture (USDA) aerial photo must be included with the application and the following items must be clearly identified on the map:
 - (1) North arrow;
 - (2) Scale bar;
 - (3) Section corners and numbers;
 - (4) Township and range numbers;
 - (5) Historic and proposed points of diversion;
 - (6) Historic and proposed places of use;
 - (7) Historic and proposed reservoir locations;
 - (8) Surface water features, including Wetlands;

- (9) Measurement and instrument locations associated with the application; and
 - (10) The place of use of all associated and supplemental water rights.
- b. Additional maps shall be submitted if the information on one map cannot convey the required information clearly and shall be of the same scale so the maps can be overlain.

1-1-111. Groundwater Diversion Standards

1. Wells:

- a. individuals that drill, make, or construct Wells or monitoring Wells on the Flathead Indian Reservation shall comply with MCA Title 37 Chapter 43 and ARM 36 Chapter 21 licensing, conduct, and regulatory requirements.
- b. all Well construction on the Flathead Indian Reservation shall meet the standards set forth in ARM 36 Chapter 21.
- c. construction and operations of all Wells must comply with all applicable Federal, State, Tribal, and Local environmental regulations.

2. Developed Springs:

- a. all Developed Spring collection components, including but not limited to infiltration galleries, infiltration basins, and French drains, shall be installed and buried under the surface of the ground.
- b. all means of storage and conveyance, including but not limited to supply pipes, cisterns, and pump housings, shall be sealed and made impervious to water and designed in a manner that protects the source from backflow and surface contamination.
- c. open pits, ponds, or excavations shall not be used as a means of diversion for Developed Springs.

- d. construction and operation of all Developed Springs must comply with all applicable Federal, State, Tribal, and Local environmental regulations.
- 3. Aquifer Injection and Injection Wells are not allowed except when exclusively used for geothermal heating and cooling systems.

1-1-112. Mitigation

- 1. Mitigation is not required for Redundant or Substitute Wells pursuant to Section 2-2-115, Stock Water Allowances pursuant to Section 2-2-116, Domestic Allowances pursuant to Section 2-2-117, authorizations for non-consumptive geothermal heating or cooling exchange wells pursuant to 2-2-119, Temporary Emergency Appropriations pursuant to Section 2-2-120, or short-term uses of an appropriation right pursuant to Sections 2-2-121 and 2-2-122, unless any provision of a Groundwater Management Area established pursuant to 1-1-109 specifically requires Mitigation for any of the aforementioned uses.
- 2. New appropriation rights that result in a Net Depletion of either surface water or groundwater shall offset the entire Net Depletion that results in adverse effect through the use of Mitigation pursuant to a Mitigation Plan.
- 3. An adverse effect to a Wetland Protective Appropriation Right recognized in [cite to Article III of the Compact] or issued pursuant to Section 2-2-123 that requires Mitigation shall include, but is not limited to, a water supply alteration that would cause:
 - a. reductions of the Wetland boundary in excess of the normal range of variability in water;
 - or
 - b. unnatural wetland plant community change.

4. A Mitigation Plan must include:
 - a. a plan of use for the proposed new Appropriation for which the Mitigation Plan is required;
 - b. an identification of the location, volume, and timing (by monthly or more frequent time step as determined by the Engineer) of the adverse effect to be mitigated;
 - c. evidence that an application for a Change in Use, if necessary, has been submitted;
 - d. the amount of water reallocated through exchange or substitution that is required to mitigate the adverse effect;
 - e. evidence that the water for Mitigation is legally and physically available;
 - f. evidence of how the Mitigation Plan will offset the Net Depletion in a manner that will offset an adverse effect on any Appropriator; and
 - g. evidence that the appropriate water quality permits, if applicable, have been applied for pursuant to the Tribal Water Quality Management Ordinance.
5. No applicant shall be required, through a Mitigation Plan, to provide more water than the quantity needed to offset the adverse effects on any Appropriator.
6. Compliance with a Mitigation Plan and proof of a water quality permit(s) issued pursuant to the Tribal Water Quality Management Ordinance, if applicable, must be included as a condition on the Appropriation Right or Change of Use.
7. If compliance with a Mitigation Plan or any applicable water quality permit(s) issued pursuant to the Tribal Water Quality Management Ordinance ceases or terminates, the holder of the Appropriation Right conditioned on compliance with the Mitigation Plan shall

immediately notify the Office of the Engineer and use of the Appropriation Right shall be suspended immediately until a new Mitigation Plan is approved and implemented pursuant to this Ordinance.

1-1-113 Monitoring, Reporting, and Adaptive Management.

[Monitoring, reporting and adaptive management for water allocation will go here after resolution of instream flow issues and FIIP stipulation.]

1-1-114. Effect of Federal Laws and Trusteeship.

1. Nothing in this Ordinance is intended to or may be construed to vary or diminish the effect of federal law or Treaty, nor to vary or diminish the powers and responsibilities of the federal government in its role as trustee of Indian natural resources.
2. Nothing in this Ordinance is intended to or may be construed to constitute Tribal ratification of:
 - a. agreements made or actions taken by federal officials or agents with respect to Reservation water resources which were illegal, unauthorized, not required by law, or not consented to by the Tribes; or
 - b. the failure of federal officials or agents to act as trustees of Indian property.

[The foregoing Section is subject to change and will be informed by the Waiver discussions between the United States and the Tribes].

1-1-115. Codification, Severability and Defense.

1. The provisions of this Ordinance are severable, and a finding of invalidity of one or more provisions hereof shall not affect the validity of the remaining provisions.
2. This Ordinance is intended to function in conjunction with those portions of Title 85 of the Montana Code Annotated codified at _____. Should those portions of the Mont. Code Ann. be amended by subsequent legislation without contemporaneous and materially identical Tribal amendment to this Ordinance, this Ordinance shall govern the use of waters within the Reservation, irrespective of the amended provisions of State law, until such time as the laws of the Tribes and the State are rendered compatible. Similarly, should this Ordinance be amended without contemporaneous and materially identical amendment of the provisions adopted into State law, those pre-existing provisions of Montana law shall govern the use of waters within the Reservation, irrespective of the amended provisions, until such time as the laws of the Tribes and the State are rendered compatible.
3. This Ordinance and subsequent amendments thereto are subject to the approval of the Secretary.
4. The Tribes adopt this code and the State adopts its parallel legislation only after concluding its provisions are lawful. Should the legality of the Ordinance, or parallel State legislation, or any provision thereof be challenged in any court the parties shall use their best effort jointly to defend the enforceability of the Ordinance, the parallel State legislation and each of the respective provisions.

1-1-116. Effective Date. This Ordinance and each provision hereof according to its terms shall take effect _____ from the date of its adoption.

PART 2 - UNITARY ADMINISTRATION AND MANAGEMENT

1-2-101. Purpose. The purpose of this Part is to establish the processes applicable to all surface and Groundwater use within the exterior boundaries of the Flathead Indian Reservation.

1-2-102. Establishment and Composition of the Water Management Board. Pursuant to Article IV.C of the Compact, the Water Management Board is established.

1-2-103. Qualifications of Board Members.

1. A Water Management Board member shall be a Reservation Resident over 18 years of age.
2. “Reservation Resident” means, for the purposes of filling a position on the Water Management Board, a Person who
 - a. does business within Flathead Indian Reservation boundaries,
 - b. is domiciled within Flathead Indian Reservation boundaries, or
 - c. owns and maintains a seasonal residence within Flathead Indian Reservation boundaries.
3. No elected official of the State of Montana, or any political subdivision thereof, or of the United States, or of the Tribes is eligible for nomination to the Board while holding such elective office. However, a nominee for Board membership shall not be disqualified by

reason of the fact that he or she is an employee or contractor of the State of Montana or any political subdivision thereof, or of the Tribes, or of the United States.

4. A Board member shall have education and experience in one or more of the following fields:
natural resources management, public administration, agriculture, engineering, commerce or finance, hydrology, biological sciences, water law or water policy.
5. No Board member may vote on any application or appeal that the Person has worked on in their non-Board capacity.

1-2-104. Public Meetings. All regular and special meetings of the Board shall be open to the observation of the general public pursuant to State and Tribal open meeting laws. Where there is a conflict of laws the law that provides the greater openness to the public applies. All Board meeting records are public records.

1-2-105. Compensation and Expenses of the Board. Each Board member shall receive such compensation for services and reimbursement for expenses for attendance at Board meetings as shall be fixed by the State and the Tribal Council [and the Secretary] for the Board members appointed by the same. The compensation for the fifth Board member shall set jointly by the State and the Tribal Council.

1-2-106. Quorum and Voting of the Board. A quorum of the Board consists of four of the five voting Board members. If a proposal put to a vote of a quorum of Board members ends in a tie vote, the proposal, or matter under consideration is deemed disapproved or denied.

1-2-107. Powers and Duties of the Board. The Board shall have those powers and duties set forth in Article IV.C.4 and 5 of the Compact and in this Ordinance, including those powers necessary and proper to carry out all Board responsibilities as set forth in the Compact and this Ordinance.

1-2-108. Technical Assistance to the Board and the Engineer. The NRD and the DNRC shall, within the limits of their respective expertise and resources, and when so requested by the Board or the office of the Water Engineer, collect, compile, and analyze information related to waters of the Reservation, their use, and the works associated with their use, and produce reports and provide technical assistance and advice to the Water Management Board or the office of the Water Engineer.

1-2-109. Qualifications of the Water Engineer.

1. The Water Engineer shall be a professional in one or more of the following water resources or management related fields:
 - a. water resources management;

- b. hydrology;
 - c. hydrogeology;
 - d. environmental science;
 - e. business or public administration;
 - f. biological science;
 - g. civil engineering;
 - h. environmental engineering; or
 - i. law.
2. The Water Engineer shall have a minimum of a bachelor's degree with 10 years of increasingly responsible experience, including three years of management experience, or a master's degree with seven years of increasingly responsible experience, including three years of management experience, or an appropriate combination of education and experience.
 3. The Water Engineer shall have the skill to deal with a diverse and sometimes contentious public.
 4. The Water Engineer shall have the ability to:
 - a. successfully manage the water resources staff;
 - b. provide technical assistance to the Water Management Board; and
 - c. act as a hearings officer and document decisions and orders in writing.

1-2-110. Duties of the Engineer. The Water Engineer shall be an employee of the

Board and shall exercise the duties set forth in the Compact and this Ordinance, and as assigned by the Board pursuant to the Compact and this Ordinance. These duties include, but are not limited to:

1. The administration of water rights on the Reservation, and the enforcement of the terms of this Ordinance and the conditions of all permits, determinations, orders, regulations, plans, policies, guidelines, and other actions taken by the Engineer of the Board, pursuant to the Compact and this Ordinance;
2. Coordination with the Project manager, as far as practicable, of the operations of the Project with the administration and enforcement of water rights outside of the Project;
3. The supervision and management of staff and contractors that are employed or engaged by the Board or Engineer to enforce and administer this Ordinance; and
4. The development and submission to the Board of budget requests for approval by the Board and forwarding to the Tribes and State for the purpose of securing necessary appropriations.

1-2-111. Immunity from Suit.

Members of the Board, the Water Engineer, any Designee, any Water Commissioner appointed pursuant to Section 3-1-114 of this Ordinance, and any staff of the Office of the Engineer responsible for carrying out powers and duties set forth in the Compact or this Ordinance relating to the authorization, administration or enforcement of water rights on the Flathead Indian Reservation shall be immune from suit for damages arising from the lawful discharge of an official duty associated with such authorization, administration or enforcement of water rights.

CHAPTER II WATER USE

PART 1. GENERAL PROVISIONS

2-1-101. Registration of Uses of the Tribal Water Right in Existence as of the Effective

Date of the Compact.

[This section under development]

2-1-102. Tribal Member and Allottee Water Rights.

1. All Tribal Members and Allottees' entitlements pursuant to 25 U.S.C. Section 381 are hereby recognized and confirmed. The attributes of these entitlements shall be defined through the process set forth in Section 2-1-101 *et seq.*, or pursuant to 1-1-107 (m) through the process set forth in Section 2-2-101 *et seq.*, as applicable.
2. No Tribal Member or Allottee may exercise, for the same water use, both a registration of Current Use and a claim, permit or exempt use under color of the Montana Water Use Act.
3. No amendment of this Ordinance that may affect a use of the Tribal Water Right may be made without Secretarial approval.

2-1-103. Contents of Registration. A registration of Current Use of a portion of the Tribal Water Right shall include the following *[Montana will draft a form]*:

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1. Name and address of the applicant;
2. Source of the water;
3. Purpose of the use;
4. Priority date of the use;
5. Legal description of the point of diversion, if any, and a description of the works at the diversion site;
6. Legal description of the place of use, and, if the purpose of the use is irrigation, of the actual acreage to which the water is applied;
7. Method of conveyance or delivery, if any, of the water to the place of use, and a description of the works by which the water is conveyed or delivered;
8. Period of use;
9. Volume and rate of use;
10. A map showing the source, point of diversion, and area of the place of use;
11. Any documentation supporting the existing use including, without limitation, copies of such documents as deeds, abstracts of claims filed with the State of Montana, original trust patents or deeds, or findings of the “Secretarial” committees; and
12. The signature of the applicant with a notarized verification of the accuracy and truthfulness of contents of the declaration.

2-1-104. Incomplete, Defective, and Amended Registrations.

1. Within _____ (___) days of filing of the registration with the NRD, the NRD shall return to the applicant a registration that is, on its face, defective or incomplete, together with the reasons for the return. The registration shall be corrected, completed, and refiled with the NRD within thirty (30) days of the date of return.
2. Any applicant may submit an amended registration within thirty (30) days of the filing of the original application.

2-1-105. Fee for Filing Registration of Current Uses. The NRD shall charge no fee for the accepting and filing of registrations of Current Uses.

2-1-106. Receipt for Registration.

[This section under development]

2-1-107. Registration of Certain Previously Unrecorded Uses of Water Arising Under State

Law. Persons who have Existing Uses on the Reservation as of the effective date of this Ordinance shall register such Existing Uses with the Board if they are uses that:

1. Were not required to be filed, pursuant to 85-2-222, MCA, and in fact were not filed as claims in the Montana General Stream Adjudication for a pre-1973 use of water arising under State law; or
2. Were developed on or after July 1, 1973, at a volume and flow rate that would qualify as an exception to the permit requirements of 85-2-306, MCA, and for which a notice of

completion of groundwater development (DNRC Form 602) or an application for provisional permit for completed Stockwater pit or reservoir (DNRC Form 605) was filed with the DNRC but not processed by the DNRC.

3. Developed after July 1, 1973, at a volume and flow rate that would qualify as an exception to the permit requirements of 85-2-306, MCA, and for which a notice of completion of groundwater development (DNRC Form 602) or an application for provisional permit for completed Stockwater pit or reservoir (DNRC Form 605) was not filed with the DNRC.

2-1-108. Process for Registration of Certain Previously Unrecorded Uses of Water Arising Under State Law.

1. Each Person claiming an Existing Use of water that falls under the terms of Section 2-1-107 shall, within 180 days of the effective date of this Ordinance, file a Registration Form [*Montana will prepare a draft form*] with the Engineer documenting that the Existing Use is for a purpose and with a flow rate and volume that falls within the terms of Section 2-1-107, and identifying:
 - a. the date of first use of the water;
 - b. the source of supply for the use;
 - c. the point of diversion by legal land description;
 - d. the place of use by legal land description; and
 - e. the period of use.

2. Upon receipt of the Registration Form, the Engineer shall review the Registration Form within 180 days and may either issue a Registration Certificate [*Montana will prepare a draft certificate*] or return a defective Registration Form to the filer, together with the reasons for returning it. If a corrected Registration Form is submitted within 30 days of its return by the Engineer, no new filing fee shall be required. Upon receiving a corrected Registration Form, the Engineer has 90 days from the certified receipt of the corrected Registration Form to issue a Registration Certificate or reject the registration. If the Engineer does not issue a Registration Certificate or reject the registration within the initial 180 day review period, the Registration Form shall be deemed approved and the Board shall issue a Registration Certificate. If the Engineer does not issue a Registration Certificate or reject the registration within 30 days of certified receipt of a corrected Registration Form, the Registration Form shall be deemed approved and the Board shall issue a Registration Certificate.
3. For any use registered under Section 2-1-107(1) of this Ordinance with a date of first use on or before August 22, 1996, the priority date of the use shall be the date of first beneficial use, and such a date shall be reflected on the Registration Certificate.
4. For any use under Section 2-1-107(2) of this Ordinance with a date of first use after August 22, 1996, but for which the user lodged a Notice of Completion of Groundwater Development (DNRC Form 602) or Application For Provisional Permit For Completed Stockwater Pit or Reservoir (DNRC Form 605) with the DNRC that the DNRC did not process, the priority date for the use shall be the date of filing of appropriate form, and such a date shall be reflected on the Registration Certificate.

5. For any use under Section 2-1-107(3) of this Ordinance with a date of first use after August 22, 1996, for which the user did not lodge a correct and complete Notice of Completion (602) or Stockwater Pit (605) with the DNRC, the priority date for the use shall be the Effective Date of the Compact, and that date shall be reflected on the Registration Certificate.
6. Any Person filing a Registration Form with the Engineer dissatisfied with the decision of the Engineer or Designee may appeal to the Board (and become an appellant) and obtain review of the Engineer's decision. A notice of appeal to the Board (Form __) must be received by the Board within 30 days of the Engineer's decision.
7. Appeal to the Board shall be pursuant to the provisions of Section 2-2-111.
8. Appeal of the Board's final decision shall be pursuant to the provisions of Section 2-2-112.

2-1-109. Failure to Register an Existing Use of Water.

Failure to register an Existing Use of water, as required under Sections 2-1-101, 2-1-102, and 2-1-107(2) and (3) of this Ordinance, shall divest the water user of any legal protections otherwise afforded under the Compact and this Ordinance, to the extent not inconsistent with federal law.

2-1-110. Limitation to Beneficial Use. Beneficial use shall be the basis, measure and limit to the use of waters within the Reservation pursuant to permits or other rights to the use of water issued pursuant to this Ordinance.

2-1-111. No Adverse Possession. No right to use water within the Flathead Indian Reservation may be acquired by prescription or by adverse possession of use.

2-1-112. Abandonment of Appropriation Right.

1. No part of the Tribal Water Right is subject to abandonment by nonuse.
2. If an appropriator, other than a user of any portion of the Tribal Water Right, ceases to use all or a part of an appropriation right, including decreed rights, permits and other water use authorizations issued under color of State law or by the Board, with the intention of wholly or partially abandoning the right, or if the appropriator ceases using the right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right is, to that extent, considered abandoned and must immediately expire.
3. If an appropriator, other than a user of any portion of the Tribal Water Right, ceases to use all or part of an appropriation right or ceases using the appropriation right according to its terms and conditions for a period of 10 successive years and there was water available for use, there is a prima facie presumption that the appropriator has abandoned the right for the part not used.
4. If an appropriator ceases to use all or part of an appropriation right in compliance with a candidate conservation agreement initiated pursuant to 50 CFR 17.32 or because the land to which the water is applied to a beneficial use is contracted under a state, tribal, or federal conservation, mitigation, or set-aside program:

- a. the land set-aside and resulting reduction in use of the appropriation right from the conservation, mitigation, or set-aside program shall not be construed as an intent by the appropriator to wholly or partially abandon the appropriation right or to not comply with the terms and conditions attached to the right; and
- b. the period of nonuse that occurs for part or all of the appropriation right as a result of the conservation, mitigation, or set-aside program shall not create and shall not be added to any previous period of nonuse to create a prima facie presumption of abandonment.

2-1-113. Procedure for Declaring Abandonment.

1. An appropriator, other than a user of any portion of the Tribal Water Right, who claims they have been or will be injured by the resumption of use of an appropriation right alleged to have been abandoned may file a petition with the Engineer to declare the appropriation right abandoned in whole or in part. If the Engineer finds that the petition provides enough information to give rise to a question of abandonment, the petition shall be posted on the Board's website within 10 working days of the determination of validity. A hearing shall be set within 180 days, or any extended period of time, not to exceed 90 days, granted by the Engineer, for the Engineer or Designee to determine whether the appropriation right has been abandoned. Discovery prior to hearing will be as provided by the Engineer, and may commence following the notice of the hearing.
2. The owner of the right alleged to have been abandoned shall be personally served notice of the hearing by the Engineer and the hearing shall be publicly noticed by the Engineer once

via a legal notice in a local newspaper of general circulation and posted by the Engineer on the Board's website for a period of 10 days commencing not less than 30 days from the date of the hearing.

3. At the hearing on the petition, the burden of proof shall be on the petitioner who must prove abandonment by a preponderance of the evidence that the appropriation has been abandoned pursuant to Section 2-1-112 of this Ordinance, unless that burden has been shifted pursuant to Section 2-1-112(3). If the burden of proof is shifted pursuant to Section 2-1-112(3), the burden of proof shall be on the owner of the right alleged to have been abandoned, who must prove by a preponderance of the evidence as lack of intent to abandon the right in question.
4. The hearing shall be recorded electronically and an official record maintained. All evidence that, in the opinion of the Engineer or Designee, possesses probative value shall be admitted, including hearsay, if it is the type of evidence commonly relied upon by reasonably prudent Persons in the conduct of their affairs. Rules of privilege recognized by law shall be given effect. Evidence which is irrelevant, immaterial, or unduly repetitious shall be excluded.
5. A written decision by the Engineer or Designee shall be rendered within 60 days of the hearing, disseminated to the parties, and posted by the Engineer on the Board's website within 10 days of its issuance. If the Person who conducted the hearing becomes unavailable to the office of the Engineer, a decision may be prepared by a Person who has read the record only if the demeanor of witnesses is considered immaterial by all parties; if any party considers the demeanor of any witness to be material to the resolution of the appeal, a new hearing must be held.

6. Any party to the abandonment hearing dissatisfied with the decision of the Engineer or Designee may appeal to the Board (and become an appellant) and obtain review of the Engineer's or Designee's decision. A notice of appeal to the Board (Form __) must be received by the Board within 30 days of the Engineer's or Designee's decision.
7. Any petitioner whose petition is rejected by the Engineer as failing to provide enough information to give rise to a question of abandonment may appeal the Engineer's decision to the Board.
8. Appeal to the Board pursuant to subsections (6) or (7) of this Section, shall be made and resolved pursuant to the provisions of Section 2-2-110.
9. Appeal of the Board's final decision shall be pursuant to the provisions of Section 2-2-112.

2-1-114. Prevention of Waste and Interference with Lawful Use.

1. Waters within the Reservation may not be wasted, nor may water be used unlawfully, nor may a lawful use of water be interfered with.
2. All facilities, works and equipment associated with the withdrawal, impoundment, pumping, diversion, drainage, or transmission of waters on the Reservation shall be so constructed, installed, and maintained as to prevent the waste, contamination, or pollution of surface and ground water and to avoid injury to the lands and property of others. All wells, producing and non-producing, which may contaminate other surface and ground waters must be properly abandoned or upgraded with a sanitary seal, in accordance with the water well

criteria incorporated by reference in Section 1-1-111. All flowing wells shall be capped or equipped with valves so that the flow of water can be stopped when the water is not being put to beneficial use.

3. The Board, on its own or through the office of the Water Engineer, may require the recipient of any permit issued pursuant to this Ordinance to construct or install a weir, head gate, valve, meter, gauge, or other reasonable and appropriate device for the control and measurement of water and for the prevention of waste.

2-1-115. Issuance of Permit Does Not Constitute Permission to Trespass. The grant of a permit pursuant to this Ordinance does not constitute a license or permission to trespass on land which the permittee does not otherwise have a legal right to access, nor does it constitute a ditch right.

PART 2. PERMIT AND CHANGE APPLICATION PROCESS

2-2-101. Water Permits and Change Authorizations on Flathead Reservation.

Except as provided for at Section 1-1-107 of this Ordinance, after enactment of the Flathead Reservation Unitary Water Code, a Person within the exterior boundaries of the Flathead Reservation may not appropriate ground or surface water for new beneficial use, or change an existing water right, or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a ground or surface water permit, or change authorization, from the Board.

2-2-102. Burden of Proof for Ground or Surface Water Permits and Change

Authorizations.

1. Applicants for a ground or surface water permit, or for a change authorization, within the exterior boundaries of the Flathead Reservation must prove by a preponderance of the evidence:
 - a. for a ground or surface water permit, that prior appropriators will not be adversely affected; or,
 - b. for a change authorization, that no adverse effect to other water rights will occur.
2. The Board, Engineer, or Designee may modify or condition any ground or surface water permit, or change authorization, to assure that:
 - a. for a ground or surface water permit, prior appropriators will not be adversely affected; and
 - b. for a change authorization, other appropriators will not be adversely affected;
 - c. the proposed means of diversion, construction, and operation of the appropriation works are adequate;
 - d. except in the case of instream flows or other non-consumptive uses, the applicant has the possessory interest or the written consent of the Person with possessory interest in the property where the water is to be put to beneficial use;
 - e. the water quality of an appropriator will not be adversely affected;

- f. the proposed use will be consistent with the classification of water set for the source of supply pursuant to water quality standards established under the federal Clean Water Act, 33 USC Section 1251 *et seq.*, and contained in regulations promulgated under the Confederated Salish and Kootenai Tribes' Water Quality Management Ordinance, Tribal Ordinance 89B;
- g. the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with water quality standards established under the federal Clean Water Act, 33 USC Section 1251 *et seq.*, and contained in regulations promulgated under the Confederated Salish and Kootenai Tribes' Water Quality Management Ordinance, Tribal Ordinance 89B.

2-2-103. Pre-Application Meeting with Office of the Engineer.

Prior to applying to the Board for a ground or surface water permit, or change authorization, within the exterior boundaries of the Flathead Reservation, applicants may meet informally with Staff regarding the application process and information requirements.

2-2-104. Application to Board.

- 1. An applicant for a ground or surface water permit, or change authorization, must:
 - a. pay the appropriate application fee in the amount set by the Board;
 - b. fill out completely the:
 - i. "Flathead Reservation Water Permit Application"; or

- ii. “Flathead Reservation Application to Change a Water Right”; and
 - iii. All applicable addenda.
 - c. attach to each application the required map; and
 - d. sign, date, and notarize or otherwise swear under appropriate oath to the accuracy of the contents of each application.
2. Upon the day of the receipt of an application, or amendment to an application, for a ground or surface water permit or change authorization, the Board must stamp it received.
 3. For a ground or surface water permit, the priority date of the application is the date the application is stamped received.
 4. After receiving and date stamping an application for a ground or surface water permit, or a change authorization, the Board shall forward the application to the Engineer.
 5. All application forms may, upon recommendation by the Engineer, be modified by a unanimous vote of the Board.

2-2-105. Engineer’s Office Adequate to Process Review.

1. Within 30 days of receipt of a forwarded application for a ground or surface water permit, or change authorization, from the Board, Staff shall review the application and make a determination whether the application is adequate to process. An application is adequate to process if it:
 - a. clearly identifies the proposed project; and
 - b. contains the information required by the following forms:

- i. “Flathead Reservation Water Permit Application”, including for Groundwater applications “Addendum B - Flathead Reservation Ground Water Minimum Aquifer Testing Requirements.”, or
 - ii. “Flathead Reservation Application to Change a Water Right”.
2. Staff may waive aquifer testing requirements if sufficient hydrogeologic information already exists on the source and in the location of the proposed development.
3. An application determined to be adequate to process shall be posted on the Engineer’s website within 10 working days of the determination of adequacy.

2-2-106. Not Adequate to Process Determination.

1. If Staff determines an application for a Groundwater or surface water permit, or a change authorization, is not adequate to process, it shall send a letter to the applicant notifying the applicant of defects in its application.
2. An applicant under this Section has 90 days from the date of mailing of the notice of inadequacy to make the application adequate to process. A ground or surface water permit application timely made adequate to process retains its priority as of the date of the application.
3. Upon receipt of the information from the applicant to correct deficiencies, the Staff must review an application and make a determination within 30 days whether it is adequate to process.

4. An application that is not timely made adequate to process is automatically terminated as a matter of law.
5. An applicant who disagrees with the decision to terminate may appeal that decision to the Board.

2-2-107. Engineer's Office Analysis and Recommended Decision.

1. Prior to the expiration of the time periods set forth in Sections 2-2-105(1), 2-2-106(2), 2-2-106(3), or 2-2-108(2) of this Ordinance, Staff may meet informally with an applicant to discuss the application. The results of such meetings shall be documented by a summary memo prepared by the Staff and included in the application file. An applicant may also submit a memo documenting the meeting, which becomes part of the application file. An application under Section 2-2-104 of this Ordinance may be amended at this time.

Amendments to an application will be reviewed to determine whether they are so substantial that they constituted a new application that must thereafter be processed under Sections 2-2-105 and 2-2-106 of this Ordinance. A determination that an application amendment is so substantial as to constitute a new application may be appealed pursuant to Section 2-2-109 of this Ordinance.

2. The office of the Engineer shall analyze an application determined to be adequate to process pursuant to Section 2-2-105 of this Ordinance within 180 days using tools or techniques that may include:

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- a. independent resources compiled by Staff (including, but not limited to, Water Resources Surveys and field notes, aerial photographs, water rights decrees, stream gauging records, well logs, and water rights records);
 - b. water use records (water measurement, ranch logs, etc.) submitted by the applicant;
 - c. field inspection by Staff, if necessary;
 - d. hydrologic or geohydrologic evaluation completed by Staff. Model results, if any, shall be documented.
3. All information relied on by the Engineering Staff in analyzing an application pursuant to this Section shall be documented in the application file.
4. Staff, using information from the application as well as their own compilation of independent resources and analysis, shall draft a recommended decision with findings of fact and conclusions of law determining:
 - a. for a ground or surface water permit, the need for, and amount of, any required Mitigation Water;
 - b. for a change authorization, whether adverse effect to other water rights will occur.
5. If the recommended decision is to grant the application, a summary of the application and the recommended decision shall be publicly noticed by the Engineer once via a legal notice in a local newspaper of general circulation and posted by the Engineer on the Board's website for a period not less than 30 days from the date the recommendation is issued. A summary of the application and the recommended decision shall also be distributed electronically to individuals or entities who have registered with the Board to receive electronic notice. If no

objections are filed, or if all filed objections are unconditionally withdrawn prior to being ruled upon, the application shall be granted by the Engineer within 10 days after expiration of the time for filing objections or after the unconditional withdrawal of the last objections, whichever date is later.

6. Amendments to applications are not allowed after the issuance of a recommended decision on that application, except as provided in Section 2-2-108(2) of this Ordinance.

2-2-108. Process if Mitigation Required.

1. If a recommended decision by Staff determines the necessity and amount of Mitigation Water necessary to approve an application, the applicant may:
 - a. withdraw the application;
 - b. appeal the determination to the Engineer pursuant to Section 2-2-109 of this Ordinance;or
 - c. prepare a mitigation plan.
2. If the applicant chooses to prepare a mitigation plan, the timeframes set forth in Section 2-2-107(2) of this Ordinance for processing that application are stayed until a timely mitigation plan is received from the applicant. The mitigation plan must be submitted within 180 days of issuance of the recommended decision requiring mitigation and must include either:
 - a. an application for authorization to change another water right so as to provide for the required mitigation water; or

- b. amendments describing the source, volume, flow rate, point of diversion, place of use, period of use, and place of storage of mitigation water that comes from other than a change authorization.
3. The processing time set forth in Section 2-2-107(2) of this Ordinance resumes upon the Board's receipt of a timely and complete amendment to an application, or a timely filed change authorization application.
4. If the mitigation plan is not submitted within 180 days of issuance of the recommended decision requiring mitigation the application shall be deemed to be denied.

2-2-109. Process if Recommended Decision is to Deny or to Require Mitigation or Other Conditions.

1. If the recommended decision is to deny an application, or grant it with the requirement of mitigation or other conditions, the applicant may appeal to the Engineer by filing a notice of appeal within 30 days of issuance of the recommended decision. An applicant may elect to have the appeal decided on the record, after submission of additional evidence and argument, or after hearing. If the applicant elects to have a hearing, that request must be made at the same time as the filing of the notice of appeal or the right to a hearing is waived. The notice of appeal must specify exceptions designating those parts of the recommended decision claimed to be in error.
2. Within 60 days from the filing of the notice of appeal, or any extended period of time, not to exceed 60 days, granted by the Engineer, the applicant may submit additional factual

evidence and legal argument in support of the application. The Engineer's Staff shall have 45 days from the applicant's submission to revise, amend, or affirm the recommended decision in a second recommended decision that explains in writing the rationale for the second recommended decision.

3. If the recommended decision or second recommended decision is to deny an application and no notice of appeal is filed pursuant to this Section, the application shall be denied by the Engineer within 10 days after expiration of the time for filing a notice of appeal.
4. The applicant bears the burden of demonstrating by a preponderance of the evidence to the Engineer, whether a hearing is held or not, that the recommended decision or second recommended decision is in error.
5. If the applicant requests a hearing before the Engineer, a hearing shall be held no later than the latest of the following:
 - a. 90 days after the filing of the notice of appeal; or
 - b. 30 days after the issuance of a second recommended decision pursuant to Section 2-2-109(2) of this Ordinance, whichever is later.
6. The hearing shall be recorded electronically and an official record maintained [*Note: need to address official record process and where these issues are addressed in the Ordinance—address after record process is established*]. All evidence that, in the opinion of the Engineer, possesses probative value shall be admitted, including hearsay, if it is the type of evidence commonly relied upon by reasonably prudent Persons in the conduct of their affairs.

Rules of privilege recognized by law shall be given effect. Evidence which is irrelevant, immaterial, or unduly repetitious shall be excluded.

7. A decision by the Engineer to reverse, modify, or affirm the recommended decision or the second recommended decision shall be made in writing within 60 days after the later of:
 - a. the timely filing of exceptions or additional evidence or legal support or the staff's second recommended decision; or
 - b. the completion of the hearing.
8. If the Engineer reverses the recommended decision or the second recommended decision, and determines that the application should be granted, the application shall be publicly noticed pursuant to the notice provisions of Section 2-2-107(5) of this Ordinance and processed according to Section 2-2-110.
9. If the Engineer affirms the recommended decision or the second recommended decision, resulting in the denial of an application, or the granting of an application with conditions, the applicant may:
 - a. withdraw the application (without filing fee refund);
 - b. present a new or modified mitigation plan, if required; or
 - c. appeal to the Board and obtain review of the Engineer's decision.

2-2-110. Notice and Hearing on Recommended Decision to Grant.

1. Any Person alleging that they will suffer adverse effect from the grant of an application for a ground or surface water permit, or a change authorization, may file an objection to a

recommended decision to grant an application. To be valid, an objection must describe the alleged adverse effect on the objector's water right.

2. An objector or an applicant may elect to have any valid objection decided on the record or after hearing. If the objector elects to have a hearing, that request must be made at the same time as the filing of the objection or the objector's right to a hearing is waived. The applicant must invoke the right to a hearing within 10 days of receiving notice of the objection or the applicant's right to a hearing is waived.
3. Discovery prior to hearing will be as provided by the Board, and may commence following the receipt of a valid objection.
4. The Engineer may hold the hearing on the objections, or assign a Designee or a Staff member from the office of the Engineer other than the Staff who prepared the recommended decision, to hold the hearing.
5. If, prior to the hearing, valid objections are withdrawn with conditions stipulated with the applicant, the Engineer shall grant the application subject to conditions as necessary to satisfy the criteria set forth in Section 2-2-102(1)(a) or (b) of this Ordinance, as applicable.
6. The Person or Persons who are charged with the duty of rendering a decision or to make findings of fact and conclusions of law in a case, after issuance of notice of hearing, may not communicate with any party or a party's representative in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate.
7. The hearing shall be recorded electronically and an official record maintained.

8. All evidence that, in the opinion of the Engineer, possesses probative value shall be admitted, including hearsay, if it is the type of evidence commonly relied upon by reasonably prudent Persons in the conduct of their affairs. Rules of privilege recognized by law shall be given effect. Evidence which is irrelevant, immaterial, or unduly repetitious shall be excluded.
9. The burden of proof is on the applicant to prove the applicable criteria of Section 2-2-102(1)(a) or (b) of this Ordinance by a preponderance of evidence.
10. A written decision by the Engineer or a Staff member or Designee assigned by the Engineer shall be rendered within 60 days of the hearing, disseminated to the parties, and posted by the Engineer on the Board's website within 10 days of its issuance. If the Person who conducted the hearing becomes unavailable to the office of the Engineer, a decision may be prepared by a Person who has read the record only if the demeanor of witnesses is considered immaterial by all parties; if any party considers the demeanor of any witness to be material to the resolution of the appeal, a new hearing must be held.
11. Any applicant or objector dissatisfied with the final decision of the Engineer or Designee may appeal to the Board (and become an appellant) and obtain review of the Engineer's or Designee's decision. A notice of appeal to the Board must be received by the Board within 30 days of the Engineer's or Designee's decision.

2-2-111. Appeal to the Board.

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1. Any question not that is raised before the Engineer or Designee may not be raised in the appeal to the Board unless it is shown to the satisfaction of the Board that there was good cause for failure to raise the question before the Engineer or Designee.
2. Appeal to the Board of decisions of the Engineer or Designee shall be confined to the record. If, before the date set for hearing the appeal, application is made to the Board for leave to present additional evidence and it is shown to the satisfaction of the Board that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the Engineer or Designee, the Board may order that the additional evidence be taken before the Engineer or Designee upon conditions determined by the Board, including the deadline for submission of additional evidence to the Engineer or Designee and for the conclusion of the Engineer's or Designee's review of any such additional evidence. The Engineer or Designee may modify the findings and decision by reason of the additional evidence or may affirm the prior decision and shall file a modified decision or notice of affirming the decision with the Board.
3. If the appellant requests an oral argument, the Board must hold oral argument on the appeal. If the appellant does not request an oral argument, the Board may, in its discretion, order oral argument or may resolve the appeal without one.
4. Review by the Board:
 - a. the review by the Board must be confined to the record. In cases of alleged irregularities in procedure before the Engineer or Designee not shown in the record, proof of the

irregularities may be taken by the Board. The Board, upon request, shall hear oral argument and receive written briefs.

- b. the Board may not substitute its judgment for that of the Engineer or Designee as to the weight of the evidence on questions of fact.
- c. the Board may affirm the decision of the Engineer or Designee or remand the case for further proceedings.
- d. the Board may reverse or modify the decision if substantial rights of an appellant have been prejudiced because:
 - i. the Engineer's or Designee's findings, inferences, conclusions, or decisions are:
 - (1) in violation of constitutional or statutory provisions;
 - (2) in excess of the authority of the Engineer or Designee;
 - (3) made upon unlawful procedure;
 - (4) affected by other error of law;
 - (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
 - (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
 - ii. findings of fact, upon issues essential to the decision, were not made although requested.

2-2-112. Appeal to Court of Competent Jurisdiction.

An aggrieved party may obtain review of a final decision of the Board by filing a petition for judicial review with a court of competent jurisdiction within 30 days of the issuance of the final Board decision. In considering the petition, the Board's legal conclusions shall be reviewed for correctness and its factual findings for abuse of discretion.

2-2-113. Project Completion.

1. Whenever a permit is issued under this Chapter, the Engineer shall specify in the permit, or in any authorized extension of time provided pursuant to subsection (2) of this Section, the time limits for commencement of the appropriation works, completion of construction, and actual application of water to the proposed beneficial use. In fixing those time limits, the Engineer shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. The Engineer shall issue the permit or authorized extension of time subject to the terms, conditions, restrictions and limitations the Engineer considers necessary to ensure that work on the appropriation is commenced, conducted, and completed and that the water is actually applied in a timely manner to the beneficial use specified in the permit.
2. The Engineer, for good cause shown, may extend the time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of water to the proposed beneficial use. If commencement of the appropriation works, completion of construction, or actual application of water to the proposed beneficial

use is not completed within the time limit set forth in the permit, or by any extension granted pursuant to this subsection, the permit is void upon lapse of the time limit.

3. Any permittee who disagrees with the time limit specified by the Engineer pursuant to subsections (1) and (2) of this Section may appeal the Engineer's decision to the Board.

2-2-114. Compliance with Project Completion Deadline.

Upon actual application of water to the proposed beneficial use within the time allowed by the Engineer pursuant to Section 2-2-113 of this Ordinance, the permittee shall notify the Engineer that the appropriation has been completed. The notification must contain a certified statement by a Person with experience in the design, construction, or operation of appropriation works describing how the appropriation was completed. The office of the Engineer shall review the certified statement and may then inspect the appropriation, and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the permittee a Flathead Reservation Appropriation Right Permit. The original of the permit shall be sent to the permittee, and a duplicate shall be kept in the office of the Engineer.

2-2-115 Redundant and Substitute wells.

1. An appropriator may change an appropriation right without the prior approval of the Board for the purpose of constructing a Substitute Well if:
 - a. the change in Appropriation Right is to replace an existing well and the existing well will no longer be used;

- b. the rate and volume of the appropriation from the Substitute Well are equal to or less than that of the well being replaced;
- c. the water from the Substitute Well is appropriated from the same Groundwater source as the water appropriated from the well being replaced; and
- d. a timely, correct and complete Notice of Substitute Well [*need form*] is submitted to the Engineer as provided in subsection 1(e) of this Section.
- e. Engineer's review:
 - i. after completion of a Substitute Well and appropriation of ground water for a beneficial use, the appropriator shall file a Notice of Substitute Well with the Engineer on a form provided by the Board.
 - ii. the Engineer shall review the Notice of Substitute Well and shall issue an authorization of a change in an appropriation right if all of the criteria in subsections (1)(a) through (1)(d) of this Section have been met and the Notice of Substitute Well is correct and complete.
 - iii. the Engineer may not issue an authorization of a change in appropriation right until a correct and complete Notice of Substitute Well has been filed with the Engineer. The Engineer shall return a defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected and completed Notice of Substitute Well within 30 days of notification of defects or within a further time as the Engineer may allow, not to exceed 180 days.

- iv. if a notice of Substitute Well is not completed within the time allowed, the appropriator shall:
 - (1) cease appropriation of water from the Substitute Well pending approval by the Engineer; and
 - (2) submit an application for a change in appropriation right to the Engineer pursuant to Section 2-2-104 of this Ordinance.
 - f. the provisions of this subsection (1) do not apply to an appropriation right abandoned pursuant to Sections 2-1-113 and 2-1-114 of this Ordinance.
 - g. for each well that is replaced under this subsection (1), the appropriator shall follow the well abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to [37-43-202](#), MCA.
2. An appropriator may change an appropriation right without the prior approval of the Board for the purpose of constructing a Redundant Well in a Public Water Supply System if the Redundant Well:
- a. withdraws water from the same ground water source as the original well; and
 - b. is required by a state, federal, or Tribal agency.
 - c. the priority date of the Redundant Well is the same as the priority date of the original well. Only one well may be used at one time.
 - d. within 60 days of completion of a Redundant Well, the appropriator shall file a Notice of Construction of Redundant Well with the Engineer on a form provided by the Board. The

Engineer may return a defective notice of construction to the appropriator for correction and completion.

2-2-116. Appropriations for Stock Water Allowances.

1. Stock Water Allowances include: Stock Water Well Allowances, Stock Water Pit Allowances, and Stock Water Tank Served by Surface Water Allowances.
2. Stock Water Allowances may be appropriated only by a Person who has a Possessory Interest in the property where the water is to be put to beneficial use and property rights in the diversionary works.
3. A Stock Water Well Allowance may be sourced from either Groundwater Wells or Developed Springs.
4. A Stock Water Pit Allowance may be sourced by groundwater seepage or a non-perennial stream.
5. A Stock Water Tank Served by Surface Water Allowance may be sourced by a perennial or non-perennial stream.
6. Inside the boundaries of a Groundwater Management Area, Stock Water Allowances may be appropriated only according to the specific provisions of that particular aquifer management designation, which may or may not provide for the issuance of Stock Water Allowances pursuant to this Section.
7. Before appropriating water for a Stock Water Well, approval from the Engineer is required.

The Engineer can approve a Stock Water Well Allowance if:

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- a. the Well construction complies with the requirements of Section 1-1-111 of this Ordinance;
 - b. the maximum flow rate is 35 gallons per minute or less;
 - c. the maximum annual diverted volume is 2.4 acre-feet or less;
 - d. the means of diversion is a single Well or Developed Spring;
 - e. the well is not physically connected to a Home or Business;
 - f. the means of diversion includes Well Shaft Casing; and
 - g. Stock Water use associated with the appropriation is dispensed using Stock Tanks.
8. Before appropriating water for a Stock Water Pit Allowance, approval from the Engineer is required. The Engineer can approve a Stock Water Pit allowance if:
- a. the capacity of the Stock Water Pit is 5 acre feet or less;
 - b. the maximum annual appropriated volume is 10 acre feet or less;
 - c. the Stock Water Pit Allowance is sourced by groundwater seepage, a non-perennial stream, or both, provided that a ditch or pipeline is not used;
 - d. the Stock Water Pit Allowance is constructed on and accessible to a parcel of land 40 acres or larger and owned or under control of the applicant; and
 - e. the construction of the means of diversion complies with Tribal Ordinance 87(A) (Aquatic Lands Conservation Ordinance).
9. Before appropriating water for a Stock Water Tank Served by Surface Water Allowance, approval from the Engineer is required. The Engineer can approve a Stock Water Tank Served by Surface Water Allowance if:

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- a. the maximum flow rate is 10 gallons per minute or less;
 - b. the combined maximum annual diverted volume is 2.4 acre-feet or less;
 - c. the means of conveyance is a fully contained pipe or hose. Open ditch conveyance is not allowed;
 - d. the construction of the means of diversion complies with Tribal Ordinance 87(A) (Aquatic Lands Conservation Ordinance); and
 - e. Stock Water associated with the appropriation is dispensed using one or more Stock Tanks.
10. An applicant must fill out completely an Application for a Stock Water Allowance (Stock Water Form A), and obtain an approval from the Engineer before developing and appropriating water for Stock Water use under the Stock Water Allowance provisions of this ordinance. In addition to these form requirements, an application shall also include:
- a. proof that the applicant has the possessory interest or the written consent of the Person with possessory interest in the property where the point of diversion is located and where the water is to be put to beneficial use; and
 - b. a site-map showing the location of all proposed Stock Water Allowance development(s) including latitude and longitude in decimal degrees. The map must include the entire property boundaries where the Stock Water Allowance development is proposed, or a minimum radius of 500 feet from any proposed Stock Water Allowance development, whichever is greater, and include any of the following that are in existence or are proposed by the applicant within the mapped area:

- c. Well(s), Pits and Stock Tanks including purpose of each;
 - d. buildings on the site, including identification well(s) connections;
 - e. property lines and ownerships; and
 - f. means of conveyance, water right points of diversions, and surface water features.
11. Upon receipt of a completed application form complying with subsection (10) of this Section, the Office of the Water Engineer shall date stamp the application form.
12. Upon receipt of a date stamped application form under subsections (10) and (11) of this Section, the Engineer shall review the application within 45 days and may either approve the appropriation or return a defective application to the applicant with a written explanation of the defects. If a corrected application is submitted within 30 days of its return by the office of the Engineer, no new filing fee shall be required. Upon receiving a corrected application, the office of the Engineer has 30 days from the certified receipt of the corrected application to approve or deny the application. If the office of the Engineer does not approve or return an application within the initial 45 day review period, the application shall be deemed approved. If the office of the Engineer does not approve or deny a corrected application within 30 days of certified receipt, the application shall be deemed approved.
13. Once an applicant meets the requirements of subsections (7) through (11) of this Section, as applicable, and an application is approved by the Engineer under subsection (12) of this Section, the Approval to Develop a Stock Water Allowance shall be issued by the Engineer. The Approval to Develop a Stock Water Allowance allows an appropriator to construct the

authorized type of Stock Water Allowance within, but not to exceed, one year of the date of approval.

14. An appropriation of a Stock Water Allowance becomes valid and final when, within 120 days of completing the diversion works and putting the water to beneficial use, an appropriator files a Stock Water Allowance completion form (Stock Water Form B) accurately and completely. The completion form must identify the as-built attributes of any Well, Pit or Stock Tank constructed. If the as-built attributes are less than or equal to the size of the Allowance for which the applicant originally applied, the Certificate of Stock Water Allowance shall be issued for the as-built attributes. The completion form for a Stock Water Well Allowance must also include a copy of the companion Well Log Report(s). No certificate of Stock Water Allowance may be issued if the as-built system exceeds the allowances contained in this Ordinance.
15. A Stock Water Allowance shall be revoked if it is not actually used to provide water to Livestock for a period of 24 consecutive months when water is otherwise available. Upon such revocation, or if the Stock Water Allowance is otherwise abandoned, the appropriator shall, within 180 days of the revocation or determination of abandonment, fill in and rehabilitate any Pits, Pit-dams, Constructed Ponds, or Reservoirs associated with the revoked or abandoned Stock Water Allowance, and shall, within 180 days of the revocation or determination of abandonment, seal any tanks or supply lines associated with the revoked or abandoned Stock Water Allowance.

2-2-117 Domestic Allowances for household and small business; process for application, review, and issuance.

1. Domestic Allowances include: Individual Domestic Allowances, Shared Domestic Allowances and Development Domestic Allowances.
2. Domestic Allowances may be appropriated only by a Person who has a Possessory Interest in the property where the water is to be put to beneficial use and property rights in the diversionary works.
3. Domestic Allowances may be sourced from either Groundwater Wells or Developed Springs.
4. Domestic Allowances may not be used to fill or maintain Pits, Pit-Dams, Constructed Ponds, or Reservoirs.
5. Inside the boundaries of a SIGMA, Domestic Allowances may be appropriated only according to the specific provisions of that particular aquifer management designation, which may or may not provide for the issuance of a Domestic Allowance pursuant to this Section.
6. Before appropriating water for Domestic Use for a single Home or Business, an approved Individual Domestic Allowance from the Water Engineer is required. The Water Engineer can approve an Individual Domestic Allowance if:
 - a. the Well construction complies with the requirements of Section 1-1-111 of this Ordinance;
 - b. the maximum flow rate is 35 gallons per minute or less;
 - c. the maximum annual diverted volume is 2.4 acre-feet or less;
 - d. the means of diversion is a single Well or Developed Spring;
 - e. the allowance is physically connected to and serves one and only one Home or Business;

- f. the means of diversion includes Well Shaft Casing;
 - g. Stock Water use associated with the appropriation is dispensed using Stock Tanks; and
 - h. the maximum irrigation allowed for land associated with the Domestic Allowance is 0.7 acres.
7. Before appropriating water for Domestic Use to be shared among multiple Homes or Businesses, an approved Shared Domestic Allowance from the Water Engineer is required. The Water Engineer can approve a Shared Domestic Allowance if:
- a. the Well construction complies with the requirements of Section 1-1-111 of this Ordinance;
 - b. the maximum flow rate is 35 gallons per minute or less;
 - c. the maximum annual diverted volume is 2.4 acre-feet or less;
 - d. the means of diversion is a single Well or Developed Spring;
 - e. the allowance is physically connected to two and not more than three Homes or Businesses that are not Developments;
 - f. the means of diversion includes Well Shaft Casing;
 - g. Stock Water use associated with the appropriation is dispensed using Stock Tanks;
 - h. if the well is connected to two homes or businesses, the maximum irrigation allowed for land associated with the Shared Domestic Allowances is 0.5 acres. If the well is connected to three homes or businesses, the maximum irrigation allowed for land associated with the Shared Domestic Allowances is 0.75 acres;
 - i. the application includes a copy of the Shared Well Agreement signed by all parties; and

- j. the allowance includes the water supply requirements for all Homes and Businesses connected to the well and all cumulative appropriations of all purposes do not exceed the limits set forth in (b) of this subsection.
8. Before appropriating water for Domestic Use for a Development of Homes or Businesses an approved Development Domestic Allowance from the Water Engineer is required. The Water Engineer can approve a Development Domestic Allowance if:
- a. the Well construction complies with the requirements of Section 1-1-111 of this Ordinance;
 - b. the maximum flow rate from each well or developed spring is 35 gallons per minute or less;
 - c. the combined maximum annual diverted volume from all wells and developed springs is 10 acre-feet or less;
 - d. Board approved measurement devices are installed on each Well or Developed Spring which record cumulative volume;
 - e. the means of diversion is one or more Wells and/or Developed Springs not to exceed one Well or Developed Spring per Home or Business within the Development;
 - f. the means of diversion includes Well Shaft Casing;
 - g. the allowance is physically connected to multiple Homes or Businesses;
 - h. Stockwater associated with the appropriation is dispensed using Stock Tanks;
 - i. the maximum irrigable landscape associated with each home or business within the Development is 0.25 acres or less;

- j. the application includes a copy of any Shared Well Agreement(s) signed by all parties, if applicable;
 - k. the allowance includes the water supply requirements for all Homes and Businesses within the entire Development and all cumulative appropriations for all purposes associated with the entire Development do not exceed the limits set forth in (b) of this subsection; and
 - l. the applicant includes a copy of the development plan, plat, or equivalent as required by the associated county government.
9. Reporting requirements for Development Domestic Allowances are addressed in subsection (14) of this Section.
10. An applicant must fill out completely an application (Form A) and obtain an approved Domestic Allowance from the Water Engineer before drilling any Well(s) or developing any spring(s) and putting water to use pursuant this Section. In addition to all form requirements, an application shall also include proof that the applicant has the possessory interest or the written consent of the Person with possessory interest in the property where the point of diversion is located and where the water is to be put to beneficial use. The application must contain a site-map showing the location of all proposed Wells and Developed Springs including latitude and longitude in decimal degrees. The map must also show a minimum of 500 feet in radius around the proposed Well(s) or Developed Spring(s) and include any existing or proposed by the applicant:
- a. Well(s) including purpose of each well;

- b. sewage facilities including septic tanks and drainfields;
- c. buildings on the site, including identification well(s) connections;
- d. property lines and ownerships;
- e. irrigated acres per lot or unit well(s); and
- f. means of conveyance, water right points of diversions, and surface water features.

11. Upon certified receipt of an application for Domestic Allowance (Form A) under subsection (10) of this Section, the office of the Water Engineer shall review the application within 45 days and may either approve the appropriation or return a defective application to the applicant, together with the reasons for returning it. If a corrected application is submitted within 30 days of its return by the office of the Water Engineer, no new filing fee shall be required. Upon receiving a corrected application, the office of the Engineer has 30 days from the certified receipt of the corrected application to approve or deny the application. If the office of the Water Engineer does not approve or return an application within the initial 45 day review period, the application shall be deemed approved. If the office of the Water Engineer does not approve or deny a corrected application within 30 days of certified receipt, the application shall be deemed approved.
12. Once an applicant meets the requirements of subsections (6), (7), or (8) of this Section, as applicable, and also meets the requirements of subsection (10) of this Section, an application is approved by the Engineer under subsection (11) of this Section and the Approval to Develop a Domestic Allowance shall be issued by the Engineer. The Approval to Develop a

Domestic Allowance allows an appropriator to construct a Domestic Allowance within, but not to exceed, 365 days of the date of approval.

13. An appropriation of a Domestic Allowance becomes valid and final when, within 120 days of completing the Well(s) or Developed Spring(s), an appropriator files a Domestic Allowance completion form (Form B) accurately and entirely, which must include a copy of the companion Well Log Report(s).
14. For each Development Domestic Allowance, a Development Domestic Allowance Water Measurement Report (*need to review* Form C) must be submitted by March 31st of the year following the year covered by the report.

2-2-118. Process for development of new uses from Flathead System Compact Water.

1. Authorization of Flathead System Compact Water.

The Tribal Council or its delegate, or any Person with the written consent of the Tribal Council or its delegate, may apply to utilize Flathead System Compact Water for any beneficial use within the Reservation or for leasing in basins outside of the Reservation by submitting a correct and complete application to the Office of the Engineer.

2. Flathead System Compact Water authorization process.

- a. a correct and complete application for a use of Flathead System Compact Water shall contain the following information:
 - i. the name of applicant;
 - ii. a description of the proposed purpose of use;

- iii. the point of diversion
 - iv. the means of diversion
 - v. the place of use;
 - vi. the flow rate, volume diverted, and volume consumed;
 - vii. the means of conveyance;
 - viii. the period of use;
 - ix. the duration or term of the permitted use;
 - x. a project plan, including a proposed completion period and, when applicable, a list of water rights to be used in conjunction with or to be replaced by the planned use of Flathead System Compact Water for which the application is being filed; and
 - xi. a map depicting all the features described by subprovisions of this subsection.
 - xii. if the applicant is not the Tribal Council, written authorization from the Tribal Council or its delegate to submit the application.
- b. upon the day of the receipt of a correct and complete application for the use of a Flathead System Compact Water, the Engineer shall stamp it received.
3. Review and action on application
- a. the Engineer or Designee shall analyze the application for the use of Flathead System Compact Water within 180 days of receipt of that application using the tools and techniques identified in Section 2-2-107(2) to determine compliance with the criteria identified in Section 2-2-102(2)(c) through (g) of this Ordinance. The proposed new use of Flathead System Compact Water shall retain the original priority date provided in

Article III of the Compact. The Engineer or Designee shall recommend that the application be granted, modified or denied. All information relied upon by the Engineer in analyzing an application shall be documented in the application file.

- b. If the recommended decision is to deny the application, the applicant may appeal the recommended decision to the Board pursuant to the provisions of Section 2-2-111 of this Ordinance.
- c. if the Engineer recommends approval or approval with modification, a summary of the application and the recommended decision shall be publicly noticed by the Engineer once via legal notice in a newspaper of general circulation on the Reservation and shall be posted on the Board's website for a period of 30 days from the date the recommended decision is issued, during which time objections may be filed with the Engineer. If no objections are filed, or if all filed objections are withdrawn prior to being ruled upon, the application shall be granted by the Engineer within 10 days after expiration of the time for filing objections has expired.
- d. To be valid for processing, an objection to an application for the use of Flathead System Compact Water must assert that and describe how the proposed development of Flathead System Compact Water fails to comply with one or more of the criteria set forth in Section 2-2-102(2)(c) through (g) of this Ordinance. Any such valid objection shall be resolved pursuant to the procedures set forth in Sections 2-2-110 through 2-2-112 of this Ordinance, provided however, that the burden of proof in the hearing before the Engineer or Designee shall be on the objector to prove by a preponderance of the evidence that the

application fails to comply with one or more of the criteria set forth in Section 2-2-102(2)(c) through (g) of this Ordinance.

[NOTE: the draft Compact will require corresponding rewrites.]

- e. the Board shall issue a Flathead Reservation Appropriation Right Permit for the applied for use unless an objector proves by a preponderance of the evidence that by the proposed use of Flathead System Compact Water fails to comply with one or more of the criteria set forth in Section 2-2-102(2)(c) through (g) of this Ordinance.

2-2-119. Authorizations for Non-consumptive Geothermal Heating or Cooling Exchange Wells.

1. The Board may issue authorizations for non-consumptive geothermal heating or cooling exchange wells with a maximum appropriation of 350 gallons a minute or less if all of the water extracted is returned without delay to the same source aquifer if the distance between the extraction well and both the nearest existing well and the hydraulically connected surface waters is more than twice the distance between the extraction well and the injection well, and if all Well construction complies with the requirements of Section 1-1-111 of this Ordinance;.
2. An applicant must fill out completely an application form and obtain an approved Authorization from the Engineer before drilling any well(s) or developing any spring(s) and putting water to use pursuant this Section. In addition to all form requirements, an application shall also include proof that the applicant has the possessory interest or the

written consent of the Person with possessory interest in the property where the point of diversion is located and where the water is to be put to beneficial use. The application must contain a site-map showing the location of all proposed wells including latitude and longitude in decimal degrees. The map must also show a minimum of 500 feet in radius around the proposed well(s) or spring(s) and include any of the following that exist or are proposed by the applicant:

- a. Well(s) including purpose of each well;
 - b. sewage facilities including septic tanks and drainfields;
 - c. buildings on the site, including identification well(s) connections;
 - d. property lines and ownerships;
 - e. irrigated acres per lot or unit well(s); and
 - f. means of conveyance, water right points of diversions, and surface water features.
3. Upon certified receipt of an application for Authorization under subsection (2) of this Section, the office of the Engineer shall review the application within 45 days and may either approve the Authorization or return a defective application to the applicant, together with the reasons for returning it. If a corrected application is submitted within 30 days of its return by the office of the Engineer, no new filing fee shall be required. Upon receiving a corrected application, the office of the Engineer has 30 days from the certified receipt of the corrected application to approve or deny the application. If the office of the Engineer does not approve or return an application within the initial 45 day review period, the application shall be

deemed approved. If the office of the Engineer does not approve or deny a corrected application within 30 days of certified receipt, the application shall be deemed approved.

4. Once an applicant meets the requirements of subsections (1), (2), and (3) of this Section, the Authorization shall be issued by the Engineer.
5. An Authorization becomes valid when, within 120 days of completing the wells or developed springs, an appropriator accurately and entirely files a Heating/Cooling Exchange completion form [*Review Montana Water Resources draft form*], which must include a copy of the companion Well Log Reports for the extraction well and the injection well.

2-2-120. Temporary Emergency Appropriations.

1. A Temporary Emergency Appropriation may be made without prior approval from the Board, but the use must cease immediately when the water is no longer required to meet the emergency.
2. A Temporary Emergency Appropriation does not include the use of water for the ordinary operation and maintenance of any trade or business, including but not limited to agricultural production.
3. Within 60 days after the cessation of a Temporary Emergency Appropriation, the appropriator shall notify the Board of the use to which the water was put, the dates of use, and the estimated amount of water used.
4. Except as set forth in subsection (5) of this Section, a Temporary Emergency Appropriation may not include the use of Enclosed Storage.

5. When the Temporary Emergency Appropriation is made by a local governmental fire agency organized under Title 7, chapter 33, MCA, or applicable Tribal law, and the Temporary Emergency Appropriation is used only for emergency fire protection, the Temporary Emergency Appropriation may include enclosed storage.

2-2-121. Short-term use of a portion of the Tribal Water Right for road construction or dust abatement.

The Tribes, or a Person with the written consent of the Tribes, may use a portion of the Tribal Water Right for road construction or dust abatement purposes subject to the following provisions:

1. For uses of 20,000 gallons or less per day from a single source of supply, no notice is required;
2. For uses greater than 20,000 gallons per day and less than 60,000 gallons per day from a single source of supply, a notice must be posted at the site of the diversion or withdrawal for the entire period during which water is being diverted or withdrawn. The notice posted shall be clearly legible and visible and provide the following information:
 - a. source of water;
 - b. purpose of use;
 - c. starting and ending date of diversion;
 - d. place of use;
 - e. diversion flow rate;

- f. maximum volume of water to be diverted or withdrawn per day; and
 - g. name and contact information for the user of the water and the Board.
3. For uses greater than 60,000 gallons per day from a single source of supply, the Board must be notified at least 10 days but not more than 45 days in advance of the initial use of the water. Notice must be posted at the site of the diversion or withdrawal, as provided in subsection (2) of this Section. Notification to the Board must provide the following information:
- a. source of water;
 - b. legal description of the point of diversion or withdrawal;
 - c. place of use;
 - d. map showing preceding three items;
 - e. purpose of use;
 - f. starting and ending date of use;
 - g. diversion flow rate;
 - h. maximum volume of water to be diverted or withdrawn per day; and
 - i. name and contact information for the user.
4. The diversion or withdrawal of water pursuant to this Section shall not adversely affect any legal use of water in existence as of the date of the diversion or withdrawal; and
5. If notified that the diversion or withdrawal of water pursuant to this Section is adversely affecting any legal use of water in existence as of the date of the diversion or withdrawal, the user will immediately cease diversion or withdrawal from that source of supply. To resume

the diversion or withdrawal, the user can move the diversion or withdrawal to another source of supply or satisfy the holder(s) of the affected legal use(s) of water in existence as of the date of the diversion or withdrawal and the Board that use will not cause adverse effects.

2-2-122. Short-term use of an appropriation right that is not part of the Tribal Water Right for road construction or dust abatement.

1. An appropriator may lease for a term not to exceed 90 days all or part of an appropriation right that is not part of the Tribal Water Right for road construction or dust abatement without the prior approval of the Board, subject to the requirements of this Section. The lease agreement must include the following information:
 - a. the name and address of the lessee;
 - b. the name of the owner of the appropriation right;
 - c. the number of the appropriation right;
 - d. the purpose of use of water for which the lease is being made;
 - e. the source of water to be appropriated;
 - f. the starting and ending date of the proposed use of water;
 - g. the proposed point of diversion;
 - h. the proposed place of use;
 - i. the diversion flow rate and volume of water to be used during the period of use; and

- j. a description of how the existing use of water will be reduced to accommodate the temporary change of use of the appropriation right, including the number and location of acres to be removed from irrigation, if applicable.
2. A short-term lease of an appropriation right under this Section may not exceed 60,000 gallons a day or the amount of the appropriation right, whichever is less. Any combination of short-term leases cannot exceed 120,000 gallons a day for one project.
 3. Except as provided in subsection (7) of this Section, the following information must be submitted to the Board at least 2 days prior to the use of water by a lessee under this Section:
 - a. a copy of the publication notice or copies of the individual notice required under subsection (4) of this Section;
 - b. a copy of the lease agreement; and
 - c. for a combination of short-term leases greater than 60,000 gallons a day for one project, an analysis by the lessee of any potential adverse effects and a description of planned actions to mitigate any potential adverse effects to appropriators in the area of the proposed point of diversion.
 4. Except as provided in subsection (7) of this Section, the lessee of an appropriation right under this section shall, 30 days prior to the use of the water, publish a notice of the proposed use of water once in a newspaper of general circulation in the area of the diversion or mail individual notice to potentially affected appropriators in the area of the proposed point of diversion. The published notice or the individual notice must contain the information listed in subsections (1)(a) through (1)(j) and (3)(c) of this Section.

5. Complaints regarding temporary use

- a. an Appropriator, whether the water right is prior or subsequent in priority to the short-term lease acquired by a Person under this Section, who cannot satisfy in full the Appropriator's right during the time that the short-term lessee is diverting water may make a complaint to the Board and cause the short-term lessee's diversion to be discontinued.
- b. the diversion is discontinued until the complaining Appropriator's water right is satisfied or until the lessee establishes to the Board that the discontinuance has had no effect on the complaining Appropriator's water right. Upon establishment that discontinuance has not had an effect, the Board shall enter an order allowing the diversion to continue.

6. This Section does not limit the remedies available to an appropriator to enjoin or to seek damages from a Person appropriating water under this Section.

7.

- a. a consolidated city-county or a county or an incorporated city or town is not subject to the requirements of subsections (3)(a) and (4) of this Section when conducting dust abatement that was not scheduled or contracted for 30 days or more prior to the use of the water.
- b. a consolidated city-county or a county or an incorporated city or town that does not publish notice as provided in subsection (4) of this Section shall post a copy of the lease agreement at the point of diversion at least 24 hours prior to and during the time that water is diverted.

2-2-123. Authorization for Wetland Protective Appropriation Rights.

1. The Board may authorize a Wetland Protective Appropriation Right for a Natural Wetland or Restored Natural Wetland.
 - a. except as authorized by Appropriation Rights issued pursuant to Section 1-1-107(1)(k), irrigation return flows may not be used as a source for an Appropriation Right issued pursuant to this Section.
 - b. a Wetland Protective Appropriation Right shall not be issued for any Wetland using Pits, Pit-dams, or Constructed Ponds.
 - c. a Wetland Protective Appropriation Right shall not be issued for any Wetland occurring solely as a result of seepage from irrigation reservoirs, canals, laterals or ditches.
 - d. a Wetland Protective Appropriation Right shall not be used for any other purpose and shall not be changed to another purpose.
2. Wetlands eligible for Wetlands Protective Appropriation Rights are:
 - a. those Wetlands identified on Map [##: Wetlands Eligible for Wetland Protective Appropriation Rights on the Flathead Indian Reservation]; or
 - b. those Wetlands not identified on the Map if:
 - i. the proposed use is a Restored Natural Wetland;
 - ii. the applicant provides a site-specific Wetlands delineation, using any delineation method approved by the Engineer, that includes:

- (1) the total number of acres and a detailed map showing the proposed boundary of the Wetland for which the Wetland Protective Appropriation Right is being applied; and
- (2) an identification of the Wetlands delineation method used, along with supporting field data.

2-2-124. Wetland Appropriation Water Permits

1. All Wetlands that utilize man-made diversions, impoundments, withdrawals, excavations, or other artificial means for the purposes of Appropriation for either all or a portion of a Wetland water supply in excess of a Natural Wetland water supply or Restored Natural Wetland water supply shall obtain, in advance of appropriation, a Water Permit or Change Authorization to appropriate pursuant Section 2-2-101 *et seq.*
2. The Board, pursuant to the provisions of Sections 2-2-101 *et seq.*, may authorize a Water Permit or Change Authorization to divert, impound, or withdraw surface water or Groundwater for a Wetland purpose.
3. In addition to the information required by Section 1-1-110 and 2-2-104 of this Ordinance, an application for a Water Permit or Change in Existing Use authorization under this section shall include:
 - a. a delineation of pre-project existing wetlands and post-project wetlands using a wetland delineation method approved by the Engineer. The delineation shall describe the following pre-project and post-project wetland attributes:

- i. the outer wetland boundary and area in acres;
 - ii. the boundaries of permanently inundated areas, depth in feet, and area in acres;
 - iii. the boundaries of seasonally inundated areas, period of inundation, depth in feet, and area in acres;
 - iv. the boundaries of permanently saturated areas and area in acres;
 - v. the boundaries of seasonally saturated areas, period of saturation, and area in acres; and
 - vi. wetland vegetation boundaries and area in acres.
- b. The location and description of the manmade diversions, impoundments; withdrawals, excavations, or other artificial means for the purposes of Appropriation;
- c. The flow rate and volume of water to be appropriated in monthly time steps; however, the Office of the Engineer may require a more frequent quantification time step;
- d. The consumptive volume for each wetland attribute delineated pursuant to Section 2-2-124(a) in monthly time steps; however, the Office of the Engineer may require a more frequent quantification time step;
- e. non-consumed water, including flow rate and volume estimates, and a description of return flows and their eventual destination and timing; and
- f. the volume of Natural Wetland water supply, if applicable, in monthly time steps.

2-2-125 Public Water Supply Reporting Requirements

1. The following shall comply with the reporting requirements set forth in subsection (2) of this

Section:

- a. any new Public Water Supply system approved pursuant to this Ordinance;
 - b. any Public Water Supply system in existence prior to the effective date of this Ordinance whose authorized use is expanded pursuant to this Ordinance.
2. On an annual basis, the Public Water Supplier shall report to the Office of the Engineer the total volume by month of pumping or diversion.

Chapter III Enforcement

[Note to reviewers: This Chapter includes references to Water Commissioners; the Parties are still discussing this issue and no decision has been made about whether to include such a position.]

3-1-101. Scope

1. The enforcement powers set forth in this Chapter apply to the resolution of disputes between Appropriators who are not served by the Flathead Indian Irrigation Project water, or between any Appropriators who are not served by the Project and any water user(s) served by the Project. Disputes between two or more users of Project water shall remain subject to the oversight of the Cooperative Management Entity (CME). Moreover, the powers and duties set forth in this Chapter, as they extend to uses of the Tribal Water Right within the Project, extend only to the resolution of disputes concerning the delivery of water to Project diversion facilities and shall not extend to the administration of that water in Project facilities or on lands served by the Project, which shall remain subject to the oversight of the CME.
2. Nothing in this Chapter, or in the Ordinance, is intended to preclude a water user from working informally with other water users, any Water Commissioner appointed pursuant to Section 3-1-114 of this Ordinance, or the Engineer, to resolve disputes or real-time water operation issues without recourse to the provisions of this Chapter. A synopsis of all such resolutions between a water user and any Water Commissioner shall be reduced to writing, and dated, a copy of which shall be kept in the office of the Engineer and available for public inspection. A synopsis of any such resolution between water users may be reduced to

writing. Provided, however, that any water user not party to any such informal resolution who believes himself or herself to be injured by the informal resolution may seek redress by invoking the provisions of this Chapter, subject to the limitation concerning Project water use set forth in subsection (1) of this Section, to challenge the informal resolution.

3. Any of the timeframes set forth in Sections 3-1-102 through 3-1-107 of this Ordinance may be extended upon mutual agreement of the parties to any dispute.

3-1-102. Complaint to the Engineer Regarding Actions or Inactions Between Appropriators.

1. Subject to the limitation concerning Project water use set forth in Section 3-1-101(1) of this Ordinance, any Appropriator aggrieved by the action or inaction of any other Appropriator, or by any Person the Complainant believes is Wasting water to the detriment of a right to use water the Complainant possesses, may complain to the Engineer (and become a Complainant). Such Complaint must be submitted in writing and describe specifically the action or inaction being complained of and the justification for the Complaint.
2. Upon receipt of a Complaint, the Office of the Engineer shall date stamp it and return a copy to the Complainant along with a written statement indicating that informal resolution of the dispute between the Appropriators, or between an Appropriator and a Person accused of Wasting water, may provide a more timely and cost-effective remedy than having the Complaint adjudicated by the Engineer.

3. Within 3 days of the receipt of the Complaint, the Office of the Engineer shall serve a copy of it on the Appropriator or other Person whose action or inaction is being complained of (the “Respondent”), and shall post notice of the Complaint on the Board’s website. The notice to the Respondent shall include a written statement indicating that informal resolution of the dispute between the Complainant and the Respondent may provide a more timely and cost-effective remedy than having the petition adjudicated by the Engineer.

3-1-103. Resolution of Complaint.

1. No later than 15 days after the provision of notice of the Complaint to the Respondent, pursuant to Section 3-1-102(3) of this Ordinance, the Engineer or the Engineer’s Designee shall hold a hearing on the Complaint, provided, however that the Engineer or Designee may take an additional 10 days before holding the hearing to perform such independent investigation into the Complaint as the Engineer or Designee deems appropriate. At such time, both the Complainant and the Respondent shall explain their positions concerning the matter complained of. All evidence that, in the opinion of the Engineer or Designee, possesses probative value shall be admitted, including hearsay, if it is the type of evidence commonly relied upon by reasonably prudent Persons in the conduct of their affairs. Rules of privilege recognized by law shall be given effect. Evidence which is irrelevant, immaterial, or unduly repetitious shall be excluded.
2. A decision by the Engineer or Designee on the Complaint shall be made in writing within 7 days after the completion of the hearing.

3. The decision of the Engineer or Designee may include an award of declaratory relief, and/or the imposition of conditions on the use or exercise of a water right. Such conditions may include, but are not limited to, instructions regarding the proper delivery of water, the installation of measuring devices, the construction of suitable ditches to carry the return waters from any ditch or lands to the main stream or proper waste way, or the mandate of structural changes to diversion structures.
4. Any Complainant or Respondent dissatisfied with the final decision of the Engineer or Designee may appeal to the Board (and become an Appellant) and obtain review of the Engineer's or Designee's decision. A notice of appeal to the Board must be received by the Board within 30 days of the issuance of the Engineer's or Designee's written decision. The decision of the Engineer or Designee shall not be stayed during the pendency of the appeal unless the Board expressly orders such a stay upon motion of the Complainant or Respondent.

3-1-104. Appeal to the Board from a Decision on a Complaint.

1. Upon receipt of a notice of appeal pursuant to Section 3-1-103(4) of this Ordinance, the Board, acting through the Office of the Engineer, shall date stamp the notice and return a copy to the Appellant. Within three days of receipt of the notice of appeal, the Board, acting through the Office of the Engineer, shall serve a copy of the notice of appeal on the other party to the dispute (who becomes the Appellee).

2. Either party to the appeal may elect to have oral argument prior to the resolution of the appeal. The Appellant must request oral argument at the time of the filing of the notice of appeal or the Appellant's right to oral argument is waived. The Appellee must request oral argument within 10 days of the Appellee's receipt of the notice of appeal pursuant to subsection (1) of this Section, or the Appellee's right to oral argument is waived. If either party to the appeal requests oral argument, such argument must be held within [60] days of the filing of the notice of appeal, or within [30] days of the receipt of evidence or argument pursuant to subsection (3) or (4) of this Section, whichever date is later.
3. Within 60 days from the filing of the notice of appeal, or any extended period of time, not to exceed 60 days, granted by the Board, the Appellant and Appellee may each submit additional factual evidence and legal argument concerning the appeal to the Board and shall serve copies of the same on the other party to the dispute.
4. Either party to the appeal shall have 60 days from the date of receipt of the evidence or argument served pursuant to subsection (3) of this Section, or any extended period of time granted by the Board, not to exceed 60 days, to respond in writing to the evidence and argument submitted by the other party to the dispute pursuant to subsection (3) of this Section.
5. If oral argument is held, the argument shall be recorded electronically and an official record maintained.
6. A decision by the Board on the appeal shall be made in writing within 60 days after the completion of oral argument or, if the right to oral argument is waived, within 60 days after

the deadline for the submission of evidence and argument pursuant to subsections (4) and (5) of this Section, whichever is later. The written decision shall set forth the ruling of the Board along with a statement of the reasons therefor.

7. In ruling on the appeal, the Board may sustain the decision of the Engineer or Designee, may overturn that decision and set aside any relief ordered by the Engineer or Designee, or may remand the matter to the Engineer or Designee for such further proceedings as may be specified in the Board's written decision.

3-1-105. Petition to the Engineer by Any Appropriator Aggrieved by Actions or Inactions of a Water Commissioner].

1. Any Appropriator aggrieved by the action or inaction or written directive from any Water Commissioner appointed pursuant Section 3-1-114 of this Ordinance, may petition the Engineer for relief (and become a Petitioner). Such petition must be submitted in writing and describe with particularity the action, inaction or directive being complained of and the justification for the complaint.
2. Upon receipt of a Petition, the Office of the Engineer shall date stamp it and return a copy to the Petitioner along with a written statement indicating that informal resolution of the dispute between the Petitioner and the Water Commissioner may provide a surer and more cost-effective remedy than having the petition adjudicated by the Engineer.

3. Within 3 days of the receipt of the Petition, the Office of the Engineer shall serve a copy of it on the Water Commissioner whose action, inaction or written directive is being complained of, and shall post notice of the Petition on the Board's website.

3-1-106. Resolution of Petition.

1. A Petitioner may elect to have the Petition decided on the record after submission of additional evidence and argument, or after hearing. If a Petitioner elects to have a hearing, that request must be made at the same time as the filing of the Petition or the right to a hearing is waived.
2. The Water Commissioner may elect to have the Petition decided after a hearing. The request for a hearing must be made within 5 days of the Water Commissioner's receipt of notice of the Petition pursuant to Section 3-1-105(3) of this Ordinance or the Water Commissioner's right to a hearing is waived.
3. If either the Petitioner or the Water Commissioner elects to have the Petition resolved after a hearing, the Engineer, or a Designee assigned by the Engineer, shall hold a hearing on the Petition no later than 14 days after the filing of the Petition, or within 14 days of the expiration of the time for the submission of evidence or argument pursuant to subsection (5) of this Section, whichever date is later, provided, however that the Engineer or Designee may take an additional 10 days before holding the hearing to perform such independent investigation into the Complaint as the Engineer or Designee deems appropriate.

4. Within 5 days from the filing of the Petition, or any extended period of time, not to exceed 5 days, granted by the Engineer, the Petitioner and Commissioner may each submit additional factual evidence and legal argument concerning the Petition to the Engineer or Designee and shall serve copies of the same on the other party to the dispute.
5. Either party to the dispute shall have [5] days from the date of receipt of the evidence or argument served pursuant to subsection (4) of this Section, or any extended period of time granted by the Engineer or Designee, not to exceed [5] days, to respond in writing to the evidence and argument submitted by the other party to the dispute pursuant to subsection (4) of this Section.
6. The Petitioner shall bear the burden of proof before the Engineer or Designee.
7. The hearing shall be recorded electronically and an official record maintained. All evidence that, in the opinion of the Engineer or Designee, possesses probative value shall be admitted, including hearsay, if it is the type of evidence commonly relied upon by reasonably prudent Persons in the conduct of their affairs. Rules of privilege recognized by law shall be given effect. Evidence which is irrelevant, immaterial, or unduly repetitious shall be excluded.
8. A decision by the Engineer or Designee on the Petition shall be made in writing within 7 days after the completion of the hearing or, if the right to a hearing is waived, within 7 days after the deadline for the submission of evidence and argument pursuant to subsections (4) and (5) of this Section, whichever is later. If the Person who conducted the hearing becomes unavailable to the office of the Engineer, a decision may be prepared by a Person who has read the record only if the demeanor of witnesses is considered immaterial by all parties; if

any party considers the demeanor of any witness to be material to the resolution of the Petition, a new hearing must be held.

9. The decision of the Engineer or Designee may include an award of declaratory relief, and/or the imposition of conditions on the use or exercise of a water right. Such conditions may include, but are not limited to, the installation of measuring devices, the construction of suitable ditches to carry the return waters from any ditch or lands to the main stream or proper waste way, or the mandate of structural changes to diversion structures.
10. Any Petitioner or Commissioner dissatisfied with the final decision of the Engineer or Designee may appeal to the Board (and become an Appellant) and obtain review of the Engineer's or Designee's decision. A notice of appeal to the Board must be received by the Board within 30 days of the issuance of the Engineer's or Designee's written decision.

3-1-107. Appeal to the Board from a Decision on a Petition.

The process for appeal to the Board of the Engineer's or Designee's decision on a Petition shall be as set forth in Section 2-2-111 of this Ordinance.

3-1-108. Appeal from a Decision of the Board.

The process for appeal from a decision of the Board on an appeal from a decision on a Complaint or a Petition shall be as set forth in Section 2-2-112 of this Ordinance.

3-1-109. Emergency Enforcement Powers of the Engineer. *[Please note that the Parties have not accepted any language in this section]*

In an Emergency, the Engineer, or any agent or employee of the Office of the Engineer who is so directed by the Engineer, including any Water Commissioner appointed pursuant to Section 3-1-114 of this Ordinance, shall have the authority to lock, remove, render inoperative, shut down, close, seal, cap, modify, or otherwise control methods of diversions and withdrawals, and obstructions to the flow of water, subject to expedited appeal to the Board by the affected Person, as provided in Section 3-1-110 of this Ordinance.

3-1-110. Additional Enforcement Powers of the Engineer.

1. The Engineer or any agent or employee of the Office of the Engineer who is so directed by the Engineer, including any Water Commissioner appointed pursuant to Section 3-1-114 of this Ordinance, may enter upon lands on the Reservation with reasonable notice to the owner or occupant, to investigate and inspect methods of diversion, withdrawal, and other activities affecting water quantity, to install measuring devices at the expense of the water user on surface and Groundwater diversions for the purpose of enforcing and administering this Ordinance, to monitor water use, water quality, and diversion structures.
2. The Engineer or any agent or employee of the Office of the Engineer who is so directed by the Engineer, including any Water Commissioner appointed pursuant to Section 3-1-114 of this Ordinance, may take action to prevent the illegal use of water, including, but not limited to the temporary decommissioning of head gates or other diversion works.

3. The Engineer may issue written notices of violation to Appropriators and to Illegal users of water for violations of this Ordinance or of the terms and conditions of any water right or of any lawful order of the Engineer or the Board or any action or directive of any Water Commissioner appointed pursuant to Section 3-1-114 of this Ordinance.
 - a. Such notices shall specify the particular violation or violations, the step(s) to be taken to come into compliance, and identify a reasonable time frame within which such steps are to be taken.
 - b. In the event of non-compliance with any such written notice within the specified time frame, the Engineer may move the Board to exercise its powers pursuant to Sections 3-1-112 and 3-1-113 of this Ordinance.
4. Upon receipt of any written recommendation, pursuant to Section 3-1-115(3) of this Ordinance, from any Water Commissioner, the Engineer may reject the recommendation or may issue notice of intent to hold a hearing to determine whether the imposition of such conditions identified in the recommendation is warranted. The process for the consideration and resolution of any such matter shall be as set forth in Sections 3-1-105 through 3-1-108 of this Ordinance, with the recommendation being treated as a petition, the Water Commissioner as the Petitioner and the affected water user(s) as Respondent(s).

3-1-111. Expedited Appeal to the Board in the Event of Certain Actions by the Engineer.

1. Any Appropriator whose use of water is affected by an action taken pursuant to section 3-1-109 or 3-1-110(2) of this Ordinance may file a written notice of appeal with the Board (and

become an Appellant). The notice of appeal must describe with particularity action being complained of and the justification for the complaint.

2. The Board must immediately notify the Engineer of the filing of a notice of appeal pursuant to subsection (1) of this Section, and must hear the appeal within 10 days of the notice of appeal being filed.
3. If the Board finds in favor of the Appellant, it may award appropriate relief, including declaratory relief, but not monetary penalties against the Office of the Engineer or any employee thereof, including any Water Commissioner appointed pursuant to Section 3-1-114 of this Ordinance, acting in either their professional or personal capacities.

3-1-112. Additional Enforcement Powers of the Board.

Upon motion by the Engineer, and after notice to any affected Appropriator and the opportunity for all parties to be heard, the Board may:

1. Impose fines, as set forth in Section 3-1-113 of this Ordinance;
2. Impose conditions on the future use of any permit issued by the Board to prevent further violation, but only upon a finding that the holder of any such permit issued by the Board is violating or has violated any provision of that permit, or is violating or has violated any order issued by the Engineer or any directive of any Water Commissioner appointed pursuant to Section 3-1-114 of this Ordinance concerning the use of that permit. The process for appeal from any Board decision imposing conditions thereon, shall be as set forth in Section 2-2-112 of this Ordinance.

3. Revoke or suspend any permit issued by the Board, but only upon a finding that the holder of any such permit issued by the Board is ...*[standard for review is under development.]*

3-1-113. Penalties.

1. The Board, pursuant to the provisions of this Section, may impose a penalty not to exceed \$1,000 per violation on any Person who fails to comply with the provisions of this Ordinance, including any written order of the Board or Engineer.
2. If a Person is using water under the color of law, fines may only be imposed commencing on the day after the resolution of any appeal from the written order of the Board or Engineer whose violation gives rise to the proposed imposition of fines, or the deadline for filing an appeal if no appeal is filed, after receipt of a written notice of violation pursuant to Section 3-1-111(2) of this Ordinance.
3. If a Person is using water Illegally, the Board may impose fines on that Person at any time commencing from the date of that Person's receipt of the notice of violation from the Engineer pursuant to section 3-1-111(3)(a), if the Illegal use is not ceased immediately upon receipt of the notice of violation.
4. Each day of violation constitutes a separate violation.
5. The process for appeal from any Board decision imposing fines pursuant to this Section shall be as set forth in Section 2-2-112 of this Ordinance.